TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 66.

THE WEST PHILADELPHIA BANK, PLAINTIFF IN ERROR,

vs.

SAMUEL DICKSON AND SPENCER M. JANNEY, ASSIGNEES IN BANKRUPTCY OF TRYON REAKIRT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 20, 1875.

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1 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April sessions, 1871, No. 38.

Be it remembered that heretofore, to wit, on the twenty-third day of August, eighteen hundred and seventy-one, Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of Tryon Reakirt, by John C. Bullitt and Chapman Biddle, esq's, their attorneys, come into our said court here and sue forth therefrom a writ of summons against the West Philadelphia Banking Company, which said writ, with the return thereto, is as follows:

2 UNITED STATES,
Eastern District of Pennsylvania, sct:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon West Philadelphia Banking Company, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of September next, to answer to Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of Tryon Reakirt, in a plea of trespass on the case.

And have you then there this writ.

Witness the Honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this twenty-third day of August, A. D. 1871, and in the 93d year of the Independence of the United States.

JOHN B. BEAVER,
Pro. Clerk of Circuit Court U. S.

I accept service of this writ for def't, and the clerk will please enter my appearance for def't.

GEO. BULL.

SEPT. 21, '71.

The clerk will also please enter the appearance of James H. Campbell, esq., as counsel with me for def't.

GEO. BULL.

(Indorsed:) No. 38. Circuit court. Session, 1871. Sam'l Dickson et. al. *vs.* West Philadelphia Banking Company. Summons. Case. Returnable on the first Monday of September next. John C. Bullitt, Chapman Biddle, attorney for plaintiff.

3 And afterward, to wit, on the seventeenth day of September, eighteen hundred and seventy-two, the said plaintiffs, by their said attorneys, come into our said court here and file of record their declaration and also their bill of particulars, which being read, are as follows, to wit:

CITY AND COUNTY OF PHILADELPHIA, *ss:*

The West Philadelphia Banking Company was attached to answer

Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of the estate and effects of Tryon Reakirt, a bankrupt, according to the provisions of the statute in force concerning bankrupts, of a plea of trespass on the case, &c.

And thereupon the said Samuel Dickson and Spencer M. Janney, assignees in bankruptcy as aforesaid, by John C. Bullitt and Chapman Biddle, their attorneys, complain:

For that whereas the defendants on the day of in the year of our Lord one thousand eight hundred and , at the county aforesaid, were indebted to the said Tryon Reakirt before he became a bankrupt in fifty thousand dollars, for goods then and there sold and delivered by the said Tryon Reakirt to the defendants at their request.

And also in the further sum of fifty thousand dollars, for goods then and their bargained and sold by the said Tryon Reakirt to the defendants at their request.

And also in the further sum of fifty thousand dollars, for work then and there done and materials for the same provided by the said Tryon Reakirt for the defendants at their request.

4 And also in the further sum of fifty thousand dollars, for money then and there lent by the said Tryon Reakirt to the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there paid by the said Tryon Reakirt for the use of the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there had and received by the defendants for the use of the said Tryon Reakirt.

And also in the further sum of fifty thousand dollars, for money found to be due from the defendants to the said Tryon Reakirt on an account then and there stated between them.

And also in the further sum of fifty thousand dollars, for interest then and there due and payable, for the forbearance by the said Tryon Reakirt at the defendants' request, for moneys before then due and owing from the defendants to the said Tryon Reakirt.

And the defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last mentioned premises, respectively, then and there promised the said Tryon Reakirt to pay him the said several last-mentioned moneys, respectively, on request; yet the defendants have disregarded their promises, and have not paid any of the said moneys, or any part thereof, to the said Tryon Reakirt before his bankruptcy, nor have they paid the same to the plaintiffs, as assignees as aforesaid, since the said bankruptcy.

And for that whereas, also, the said defendants before the said Tryon Reakirt became bankrupt, to wit, on the day and year aforesaid,

5 were indebted to the said Tryon Reakirt in certain monies and for certain causes of action, to wit, the said monies being in arrear, the defendants, in consideration of the premises, afterwards and subsequent to the bankruptcy of the said Tryon Reakirt, to wit, on the day of , A. D. 187 , promised the plaintiffs, as assignees as aforesaid, to pay them the said monies on request; yet the said defendants have not paid the same, nor any part thereof.

And also for that whereas the defendants, on the day and year last aforesaid, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy, at the county aforesaid, were indebted to the plaintiffs, as assignees as aforesaid, in fifty thousand

dollars, for goods then and there sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars, for goods then and there bargained and sold by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars for work then and there done and materials for the same provided by the plaintiffs, as assignees as aforesaid, for the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there lent by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there paid by the plaintiffs, as assignees as aforesaid, for the use of the defendants at their request.

6 And also in the further sum of fifty thousand dollars, for money then and there had and received by the defendants for the use of the plaintiffs, as assignees as aforesaid.

And also in the further sum of fifty thousand dollars, for money found to be due from defendants to the plaintiffs, as assignees as aforesaid, on an account then and there stated between them.

And also in the further sum of fifty thousand dollars, for interest then and there due and payable for the forbearance by the plaintiffs, as assignees as aforesaid, at the defendants' request, for moneys before then due and owing from the defendants to the plaintiffs, as such assignees.

And the defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last mentioned premises, respectively, then and there promised the plaintiffs, as assignees as aforesaid, to pay them the said several last-mentioned moneys, respectively, on request; yet the defendants have disregarded their promises and have not paid any of the said moneys, or any part thereof, to the damage of the plaintiffs fifty thousand dollars.

And therefore they bring suit, &c.

JOHN DOE,
RICHARD ROE,
Pledges, &c.

JOHN C. BULLITT,
CHAPMAN BIDDLE, (by L.,)
For plaintiffs.

7 *Bill of particulars.*

Plaintiffs claim to recover, under common counts, money received from Tryon Reakirt, or on his account, through B. K. Jamison or B. K. Jamison & Co., of which the following is believed to be a correct statement, viz:

Order or check paid in Feb'y, 1871, by Richards & Thompson to B. K. Jamison or B. K. Jamison & Co., $3,000.

Draft paid by Evans Wharton to same for $2,000.

Collections made in the year 1871, in N. Y., for the benefit of the bank in sundry attachments in the name of Benton K. Jamison and *and* W'm M. Stewart, trading as B. K. Jamison & Co., against E. D. Randolph & Co. and E. Wharton & Co., amounting to five thousand eight hundred dollars and upwards, ($5,800.)

8 And afterwards, to wit, on the 30th day of September, eighteen hundred and seventy-two, the defendants, the West Philadelphia

Banking Company, by their attorneys, James H. Campbell and George Bull, come into court here and filed their pleas, which said pleas are as follows, to wit:

Defendant pleads non assumpsit, set-off, and payment, with leave to put the special matter in evidence, &c.

JAMES H. CAMPBELL,
GEO. BULL,
For Def't.

Replication.

And now afterwards, to wit, on the 22d day of March, eighteen hundred and seventy-three, the said plaintiffs, by their attorneys, Chapman Biddle and John C. Bullitt, esq'r's., come into court here and file their replication, as follows, to wit:

Plaintiffs' reply, non solvit; no set off and issue.

CHAPMAN BIDDLE,
J. C. BULLITT,
By A. C. M.

And afterwards, to wit, on April 24th, eighteen hundred and seventy-three, plaintiffs move to amend the record by altering the name of the corporation defendant to the West Philadelphia Bank.

9 And afterwards, to wit, on the day and year last aforesaid, come the parties aforesaid, by their attorneys aforesaid, and a jury being called come, to wit:

1. William A. Bosler,
2. John S. Baker,
3. Charles H. Cake,
4. Amos Bateman,
5. Charles F. Deffemary,
6. William Allmendinger,
7. Charles Dean,
8. John F. Ducomb,
9. William H. Manealy,
10. William Levy,
11. Anthony C. Glasson,
12. Mitchell Sandgraw,

Who are respectively sworn and affirmed to try the issues joined, &c.

Whereupon, on the same day, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the plaintiffs, and assess the damages at ten thousand seven hundred and twenty-five $\frac{54}{100}$ dollars, with costs.

And afterwards, to wit, on the 28th day of April, in the year last aforesaid, the defendants, by their attorney, come into court here and moves the court for a new trial.

And afterwards, to wit, on the 30th day of April, in the year last aforesaid, the motion for a new trial having been duly considered by the court, a new trial is granted.

10 And afterwards, to wit, on the sixth day of April, eighteen hundred and seventy-four, a jury being called come, to wit:

1. William S. Richardson,
2. Richard Peltz,
3. William Meneke,
4. Jacob H. Beattas,
5. Edward E. Eyre,
6. John S. Crombergar,
7. William Boehm,
8. Bentley H. Smith,
9. Joseph W. Numbers,
10. Theodore Allen,
11. William T. Donaldson,
12. Prentice P. Gustine,

Who are respectively sworn and affirmed to try the issue joined, &c.

Whereupon, on the seventh day of April, eighteen hundred and seventy-four, the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say that they find for the plaintiffs, and assess the damages at nine thousand five hundred and fifty-nine $\frac{76}{100}$ dollars, ($9,559$\frac{76}{100}$) with costs.

And thereupon, forasmuch as the court now here is not advised about giving judgment of and upon the premises, day is therefore given to the said parties to be before the court for hearing judgment of and upon the premises, because the said court here is not yet advised thereupon,

at which said date, to wit, on the 18th day of April, eighteen
11 hundred and seventy-four, before the honorable William McKennan, circuit judge, and the honorable John Cadwalader, district judge of said court, come the said plaintiffs, Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of Tryon Reakirt, by their attorney aforesaid; whereupon, the premises being seen and fully understood by the court here, and mature deliberation being had thereon, it is considered that the said plaintiff do recover from the said West Philadelphia Bank, the defendant, the said sum of nine thousand five hundred and fifty-nine and $\frac{76}{100}$ dollars, ($9,559$\frac{76}{100}$,) their damages aforesaid, and also adjudged to the said plaintiffs by the court now here at their request for increase of their said costs and charges, which said damages amount in the whole to the sum of

And the said defendant in mercy, &c.

12 Be it remembered that in the term of April sessions, A. D. 1871, came Samuel Dickson and Spencer M. Janney, assignees of the estate of Tryon Reakirt, a bankrupt, into the circuit court of the United States for the eastern district of Pennsylvania, and impleaded the West Philadelphia Bank in a certain plea of assumpsit, &c., in which the said plaintiff declared:

CITY AND COUNTY OF PHILADELPHIA, *ss:*

The West Philadelphia Banking Company was attached to answer Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of the estate and effects of Tryon Reakirt, a bankrupt, according to the provision of the statute in force concerning bankrupts, of a plea of trespass on the case, &c.

And thereupon the said Samuel Dickson and Spencer M. Janney, assignees in bankruptcy as aforesaid, by John C. Bullitt and Chapman Biddle, their attorneys, complain:

For that whereas the defendants, on the day of in the year of our Lord one thousand eight hundred and at the county aforesaid, were indebted to the said Tryon Reakirt, before he became a bankrupt, in fifty thousand dollars, for goods then and there sold and delivered by the said Tryon Reakirt to the defendants at their request.

And also in the further sum of fifty thousand dollars, for goods then and there bargained and sold by the said Tryon Reakirt to the defendants at their request.

13 And also in the further sum of fifty thousand dollars, for work then and there done and materials for the same provided by the said Tryon Reakirt for the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there lent by the said Tryon Reakirt to the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then

and there paid by the said Tryon Reakirt for the use of the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there had and received by the defendants for the use of the said Tryon Reakirt.

And also in the further sum of fifty thousand dollars, for money found to be due from the defendants to the said Tryon Reakirt on an account then and there stated between them.

And also in the further sum of fifty thousand dollars, for interest then and there due and payable for the forbearance by the said Tryon Reakirt at the defendants' request, for moneys before then due and owing from the defendants to the said Tryon Reakirt.

And the defendant afterwards, to wit, one the day and year last aforesaid, at the county aforesaid, in consideration of the several last mentioned premises, respectively, then and there promised the said Tryon Reakirt to pay him the said several last mentioned moneys, respectively, on request; yet the defendants have disregarded their promises
14 and have not paid any of the said moneys or any part thereof to the said Tryon Reakirt before his bankruptcy, nor have they paid the same to the plaintiffs, as assignees as aforesaid, since the said bankruptcy.

And for that whereas, also, the said defendants, before the said Tryon Reakirt became bankrupt, to wit, on the day and year aforesaid, were indebted to the said Tryon Reakirt in certain monies, and for certain causes of action, to wit, the said monies being in arrear, the defendants, in consideration of the premises, afterwards and subsequent to the bankruptcy of the said Tryon Reakirt, to wit, on the day of A. D. 187 , promised the plaintiffs, as assignees as aforesaid, to pay them the said monies on request; yet the said defendants have not paid the same, nor any part thereof.

And, also, for that whereas the defendants, on the day and year last aforesaid, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy , at the county aforesaid, were indebted to the plaintiffs, as assignees as aforesaid, in fifty thousand dollars, for goods then and there sold and delivered by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars, for goods then and there bargained and sold by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars, for work then and there done and materials for the same provided by the plaintiffs, as assignees as aforesaid, for the defendants at their request.

15 And also in the further sum of fifty thousand dollars, for money then and there lent by the plaintiffs, as assignees as aforesaid, to the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there paid by the plaintiffs, as assignees as aforesaid, for the use of the defendants at their request.

And also in the further sum of fifty thousand dollars, for money then and there had and received by the defendants for the use of the plaintiffs, as assignees, as aforesaid.

And also in the further sum of fifty thousand dollars, for money found to be due from the defendants to the plaintiffs, as assignees as aforesaid, on an account then and there stated between them.

And also in the further sum of fifty thousand dollars, for interest then and there due and payable, for the forbearance by the plaintiffs, as

assignees as aforesaid, at the defendants' request, for moneys before then due and owing from the defendants to the plaintiffs, as such assignees.

And the defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration of the several last-mentioned premises, respectively, then and there promised the plaintiffs, as assignees as aforesaid, to pay them the said several last-mentioned moneys, respectively, on request, yet the defendants have disregarded their promises, and have not paid any of the said money or any part thereof, to the damage of the plaintiff fifty thousand dollars.

And therefore they bring suit, &c.

JOHN DOE,
RICHARD ROE,
Pledges, &c.

16 And the said defendants pleaded "non assumpsit, set-off, and payment, with leave to put the special matter in evidence, &c." And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city aforesaid, before the honorable the judges of the said court, on Monday, the sixth day of April, A. D. 1874, the aforesaid issue between the said parties came to be tried by a jury of the said county, for that purpose impannelled:

1. William S. Richardson,
2. Richard Peltz,
3. William Meneke,
4. Jacob H. Beattas,
5. Edward E. Eyre,
6. John S. Crombergar,
7. William Boehm,
8. Bentley H. Smith,
9. Joseph W. Numbers,
10. Theodore Allen,
11. William T. Donaldson,
12. Prentice P. Gustine.

At which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issues being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff, to maintain the issue on their behalf, called

SAMUEL A. RICHARDS, who, being duly sworn, testified as follows:

17 In February, 1871, I was a member of the firm of Richards & Thompson, bankers and brokers, No. 33 South 3d st., Philadelphia. Our house had dealings with Tryon Reakirt, purchase and sale of stocks and gold. I last saw him on the 7th of February, 1871. (Check shown.) I recognize this check. It was given in our office on the evening of February 6th, 1871, about 4 or 5 o'clock. There was present at the time M'r Jamison, M'r Reakirt, my partner, and myself. M'r Jamison was in our private office with Reakirt for a half hour. He came out to the main office and asked me what M'r Reakirt's balance with us was. I said about $3,000. He went back to the private office, returned, and asked me to fill up a check for $3,000, which I did. This is the check. The money was drawn on this check. It is to the order of the West Philad'a Bank. It is endorsed S. E. Neilor, cashier, per B. K. Jamison. M'r Jamison was a director in the bank.

And being cross-examined he testified as follows:

M'r Reakirt had been there about a half hour before M'r Jamison come. I sent for M'r Jamison—sent him word that Reakirt was there. M'r Jamison came, and they remained in my back office for a half hour. I heard nothing that was said. M'r Reakirt was there the next day.

I collected for him the next day a draft for $15,000 on D. C. Wharton, Smith & Co. I learned several days after that he had left the city. M'r Reakirt did a good business through our house. We bought
18 and sold some thousands of shares of stocks for him at times. I suppose his transactions with us amounted to $200,000 at some times. This was a month or so before. I knew he was doing business in New York. The first I heard of M'r Reakirt being a forger was I believe in the afternoon of Feb'y 6th. I saw M'r Jamison shortly afterwards. The fact was not generally known at that time. I got my information from the president of the 7th National Bank. We had no stocks, gold, &c., of M'r Reakirt on hand on the 6th of Feb'y. It had been closed several days before. I didn't know anything about his having Lake Shore stock in New York. M'r Reakirt had a drug house in this city. Up to the 6th of Feb'y, 1871, M'r Reakirt had the reputation of being a man in large business and prosperous circumstances. I generally required margins to be put up to protect me.

Re-examined:

I heard of the forgeries during the day from M'r Irwin. He produced the notes that were forged. They were three notes of $3,000 or $4,000 each. M'r Jamison was the first one I told of it. I told him what M'r Irwin had said. I wanted to give him the first chance.

BENTON K. JAMISON, being duly sworn, testified as follows:

I am a member of the firm of B. K. Jamison & Co. Was a director in the West Philadelphia Bank in 1871, and am since. We placed a loan of $10,000 for Reakirt with the West Philadelphia Bank, with notes purporting to be issued by O. S. Janney & Co. as collateral.
19 In the afternoon of Feb'y 6th heard that Reakirt had forged paper. I at once called on O. S. Janney & Co. They informed me that the notes placed with the bank as collateral were forged. I then went in search of Reakirt. I called first at the store of Tryon Reakirt & Co. Found Reakirt's father there and told him about it. I asked him if he would not protect the honor of his son. He said he did not know where Tryon was, and that he could do nothing about it. I then went to the office of Richards & Thompson. Richards did not send for me; he only told me about the forgeries. I found Reakirt in the back office. I demanded the return of the money, and he said it would all be fixed up the next day; that his grandfather, M'r Tryon, was going to fix it up. I told him I preferred to have it settled that day. I then asked Richards how much of a balance Reakirt had with them, and he replied "about $3,000." I told M'r Richards to fill up a check for that amount, which he did. This check I handed to Reakirt and requested him to sign it, and he complied. I then asked Reakirt if he had any funds in New York. He said he thought he had about $2,000 there with Evans, Wharton & Co. I told him to give me a draft on them for that amount, which he did. He denied having any other funds whatever. I then went to New York, put the claim in the hands of counsel there, and instructed them to take the shortest road to the money. Subsequently, as the result of their proceedings, we received the balance of the claim from them less the expense of collection.
20 I received on the 6th of February $3,000, on the 7th of February proceeds of draft for $2,000, and probably on the 26th of April proceeds of the collection in New York, amounting to $4,559.76. This money was paid over to the bank June 20th, 1871. The legal proceedings in New York were conducted in the name of our firm for the benefit of the bank.

Cross-examined:

Prior to Feb'y 6th, 1871, I had known M'r Tryon Reakirt personally for a year or two. I had known him by reputation for 10 or 12 years. I knew of his father, John Reakirt, and his grandfather, M'r Tryon. I knew then that M'r Tryon was reputed to be quite wealthy, and the father, John Reakirt, stood well financially. M'r. Tryon at that time was supposed to be worth two or three hundred thousand dollars. I then had good reason to believe that M'r. Tryon was perfectly able to fix up all of Tryon Reakirt's affairs, if he so wished. I did not, however, have any great confidence in Reakirt's integrity after I heard of the forgery. Prior to that I had always believed him to be a correct business man. His reputation as a prosperous business man was very good before the 6th of Feb'y, 1871. He always stood well. He had a drug-house which was supposed to be large and prosperous. He was also interested in a factory in Wilmington. I understood at the time that his invest-
21 ment there was about forty thousand dollars. His credit financially and as a business man was excellent. Reakirt's loan from the West Philadelphia Bank was negotiated through us as brokers. I may have given him the name of our principal; don't recollect now. The bank knew nothing about the forgery until after I had got the $5,000 from Reakirt. After getting this money I went over and told them all about the matter. That was the first they knew about it. In pursuing Reakirt I acted upon my own motion, without consultation with the bank. I assumed the responsibility. I took from Reakirt his own collateral note, and the note of O. S. Janney & Co. accompanied it as collateral. His note of course was genuine, and the collaterals (notes of O. S. Janney & Co.) were forged. At the time I demanded payment from Reakirt both his note and the collateral notes had some time to run. I acted upon the principle that he had obtained our money fraudulently, and that the bank was entitled to restitution. At the time I called on Reakirt in Richards & Thompson's office I told him that if the money was not paid or returned to the bank forthwith they would proceed against him in a very summary manner on account of this forgery. I pressed him to fix it. Reakirt gave me no information about the money in New York. He denied that he had any there. I received the information from other parties. When he said his grandfather would arrange it I thought there might be a probability, but I
22 did not want to take any chances.

His forgeries amounted to about $100,000, the amount he acknowledged.

Re-examined:

I knew of the bankruptcy proceedings as early as Feb'y 21st, 1871. I have not heard of the amount realized from the drug business. After I heard of the forgeries I had no particular confidence in his integrity.

And further to maintain the issues on their part, the plaintiffs offered in evidence check drawn by Tryon Reakirt & Co. in favor of the West Philadelphia Bank for three thousand dollars, on Richards and
23 Thompson, dated Feb'y 6th, 1871; also exemplification of the record of the suit in New York:

The people of the State of New York, by the grace of God free and independent, to all whom these presents shall come or may concern, greeting:

Know ye, that we, having examined the records and files in the office of the clerk of the county of New York, and clerk of the supreme court of said State for said county, do find a certain judgment-roll and execution in a suit in the said supreme court, in which Benton K. Jamison et al. were plaintiffs and Tryon Reakirt was defendant, there remaining, of which the within and following are correct copies of such original record of said judgment-roll and execution, in the words and figures following, to wit:

Supreme court, city and county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART, plaintiffs, *against* TRYON REAKIRT, DEFENDANT. } Summons for a money demand on contract. (Com. not ser.)

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the city and county of New York, at the new court-house, New York City, and
24 to serve a copy of your answer to the said complaint on the subscribers at their office, No. 9 Nassau street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will take judgment against you for the sum of five thousand dollars the day of one thousand eight hundred and , besides the costs and disbursements of this action.

Dated New York, Feb'y 8th, 1871.

GRAY & DAVENPORT,
Plaintiffs' Attorneys, 9 Nassau St., N. Y.

(Endorsed:) Defendant not found. M. T. Brennan, sheriff.

Supreme court, county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART *against* TRYON REAKIRT.

The complaint of the plaintiffs above named, by Gray and Davenport, their attorneys, respectfully shows to this court:

That said plaintiffs are, and at the times hereinafter mentioned were, copartners doing business in the city of Philadelphia, and State
25 of Pennsylvania, as bankers and brokers, under the firm-name and style of B. K. Jamison & Company; that on or about the twenty-fourth day of December, 1870, defendant came to said plaintiffs and requested the loan of five thousand dollars from said plaintiffs to said defendant, and offered as collateral security, and as an inducement to these plaintiffs to make the said loan, three certain promissory notes, each dated September 1st, 1870, and purporting to be, and falsely and fraudulently represented by said defendant to be, made by O. S. Janney & Company to the order of Tryon Reakirt and Company, for the following amounts and times, respectively, viz, one for six thousand one hundred and eighty dollars, payable six months after date; one for six thousand

three hundred & sixty dollars, payable twelve months after date; and one for six thousand five hundred & forty dollars, payable eighteen months after date; said notes representing in the aggregate the nominal value of nineteen thousand and eighty dollars; that plaintiffs, believing the notes to be genuine and relying on the representations of the said defendant, were induced to make the said loan to said Tryon Reakirt upon the security of the said notes, and said defendant thereupon endorsed said notes and delivered them to said plaintiffs, and said plaintiffs thereupon loaned to said defendant said sum of five thousand dollars.

And said plaintiffs further show that on or about the 26th day of January, 1871, said defendant requested the further loan to himself of five thousand dollars from the said plaintiffs, as against the collateral
26 security of the said notes hereinabove described, and said plaintiffs, still believing that the said notes held by them as a security for the repayment of the previous loan of five thousand dollars were genuine and valid and ample security for a further loan of five thousand dollars, and still relying on said representations of defendant, loaned to said defendant the further sum of five thousand dollars. That the sums so above loaned amounted in the aggregate to ten thousand dollars.

And these plaintiffs further allege that on or about the 6th day of February, 1871, they discovered that the aforesaid notes and every of them were utterly worthless, and the signatures of the makers thereof were forged by the said Tryon Reakirt, and that the representations made by said defendant in regard to said notes were false and made with the intent to deceive and defraud these plaintiffs. That immediately upon the discovery by these plaintiffs that said notes were forgeries, that the consideration for which they had loaned the *the* aforesaid sums of money was utterly worthless, and that said representations of said defendant were entirely false, they demanded of said defendant repayment of the sums of money loaned by them to him, and amounting in the aggregate to said sum of ten thousand dollars. That said defendant has paid five thousand dollars of the said sum of ten thousand dollars, but has refused to pay the balance thereof. Wherefore these plaintiffs de-
27 mand judgment against defendant for the sum of five thousand dollars, besides the costs of this action.

GRAY & DAVENPORT,
Att'ys for the Pl'ffs, 9 Nassau St., N. Y.

CITY & COUNTY OF NEW YORK, *ss:*

John C. Gray, of said place, being duly sworn, says that he is one of the attorneys for the plaintiffs in this action; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason this verification is not made by the plaintiffs is that neither of them is within the county of New York, but both reside in Philadelphia, State of Pennsylvania; that deponent resides in said county; that this deponent's knowledge is derived from and the grounds of his belief are the statements made to him by said plaintiffs and from letters received by deponent from said plaintiffs.

(S'd) J. CLINTON GRAY.

Sworn to before me this 15th day of February, 1871.

(S'd) JOHN HAYES,
Notary Public in & for N. Y. Co.

28 Supreme court, New York County.

BENTON K. JAMISON & WILLIAM M. STEWART
against
TRYON REAKIRT.

CITY & COUNTY OF NEW YORK, *ss:*

John P. Otis, of the city of Brooklyn, county of Kings, being duly sworn, says that he is clerk in the office of the plaintiffs' attorneys in above-entitled action; that on the 16th day of February, 1871, deponent filed the original summons and complaint in said action, of which annexed is a copy, in the office of the clerk of the county of New York, in the new court-house in said city, and that deponent verily believes said summons & complaint to remain & be still on file in said office.

(S'd) JOHN P. OTIS.

Subscribed & sworn to before me this 21st day of April, 1871.

(S'd) JOHN HAYES,
Notary Public in & for N. Y. Co.

29 Supreme court, county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART
against
TRYON REAKIRT.

CITY & COUNTY OF NEW YORK, *ss:*

John Clinton Gray, being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action; that a summons has been issued; that a cause of action exists in favor of the plaintiffs against the defendant herein, for the sum of five thousand dollars, as more fully appears by the complaint filed in the office of the clerk of the city and county of New York, this 16th day of February, 1871; that said defendant cannot be found, after due diligence, within this State; that said defendant is not resident of this State, but resides at Philadelphia, in the State of Pennsylvania, and has property in this State, to wit, funds in the hands of E. D. Randolph & Company, bankers, of the city of New York, county and State of New York, and Evans, Wharton & Company, bankers, of the same place, upon which attachment has been levied; that this action arises on contract; that this court has jurisdiction of the subject of the action.

(S'd) J. CLINTON GRAY.

Sworn to before me this 15th day of February, 1871.

(S'd) JOHN HAYES,
Notary Public in & for N. Y. Co.

30 Supreme court, county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART
against
TRYON REAKIRT.

At a special term of said court, held in and for the city & county of New York, at the new court-house in said city, on the 16th day of February, 1871.

Present, Hon. Geo. G. Barnard, justice.

It appearing to my satisfaction, by the affadavit of John C. Gray, hereto annexed, that the above-named defendant, Tryon Reakirt, cannot, after due diligence, be found within this State; that a cause of action exists in favor of the plaintiffs herein against said defendant; that said defendant is not a resident of this State, but resides at Philadelphia, State of Pennsylvania, and has property in this State, and that this court has jurisdiction:

Now, therefore, on motion of Gray & Davenport, attorneys for the plaintiffs, it is hereby ordered that service of the summons in this action be made upon said defendant by publication thereof, once a week for six weeks, in two newspapers, to wit, the Leader and the Star, and which I do hereby designate as most likely to give notice to the said defendant; and I do hereby also direct a copy of the summons
31 and complaint in this action to be forthwith deposited in the post-office of the city of New York, directed to said defendant, Philadelphia, State of Pennsylvania, his place of business, and the postage paid thereon.

Dated New York, Febr'y 16th, 1871.

(S'd) Enter:

(Signed) GEORGE G. BARNARD, *J. S. C.*

A copy:

(Signed) CHA'S E. LOEW, *Clerk.*

Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. STEWART *ag'st* TRYON REAKIRT.

CITY & COUNTY OF NEW YORK, *ss:*

John P. Otis, being duly sworn, says that he did, on the sixteenth day of February, 1871, deposit in the post-office of the city of New York copy of the annexed summons and complaint, suitably enclosed, and directed to Tryon Reakirt, esqr., the defendant herein, at Philadelphia, State of Pennsylvania, having first paid the proper postage thereon.

(S'd) JOHN P. OTIS.

Sworn to before me this 18th day of February, 1871.

[NOTARIAL SEAL.] (S'd) JOHN HAYES,
Notary Public in & for N. Y. Co.

32 Supreme court, New York County.

BENTON K. JAMISON & WILLIAM M. STEWART *vs.* TRYON REAKIRT. } Suit No. 1. Affidavit of publication of summons.

STATE OF NEW YORK,
City & County of New York, ss:

W'm McCoy, being duly sworn, saith that he is foreman in the office of the New York Star, a newspaper printed in the city of New

York; that the advertisement hereto annexed (see below) has been regularly published in the said New York Star once a week for six (6) weeks, successively, commencing on the seventeenth (17) day of February, 1871.

(S'd) W'M McCOY.

Sworn to before me this 4th day of April, 1871.

(S'd) AUGUSTUS P. DUNLOP,
Notary Public, N. Y. Co.

(Copy advertisement.)

Supreme court, city and county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART, plaintiffs, *against* TRYON REAKIRT, DEFENDANT } Summons for a money demand on contract. (Com. not ser.)

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk the city and county of New York, at the new court-house in the city of New
33 York, and to serve a copy of your answer to the said complaint on the subscribers, at the office, No. 9 Nassau street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and, if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of five thousand dollars, besides the costs and the disbursement of this action.

Dated New York, February 8th, 1871.

GRAY & DAVENPORT,
Plaintiffs' Attorneys, 9 Nassau Street.

To the defendant:

You will please take notice that the complaint in the above-entitled action was this day filed in the office of the clerk of the city and county of New York, in the new county court-house in said city.

Dated New York, February 16th, 1871.

GRAY & DAVENPORT,
Plaintiffs' Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

Gilbert Vale, of the city of New York, being duly sworn, says that he is the foreman in the office of the New York Leader, a weekly paper printed and published in the city of New York, and that the summons & notice of which the annexed is a printed copy has been regularly published in the New York Leader, once a week, for six consecutive weeks, commencing on the 18th day of February, 1871.

(S'd) GILBERT VALE.

Sworn to before me this 1st day of April, 1871.

34 (S'd) DAVID DAVIDS,
Notary Public, N. Y. Co.

(From printed copy.)

Supreme court, city and county of New York.

BENTON K. JAMISON AND WILLIAM M. STEWART, plaintiffs,
against
TRYON REAKIRT, DEFENDANT.

Summons for a money demand on contract. (Com. not ser.)

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the city and county of New York, at the new court-house in the city of New York, and to serve a copy of your answer to the said complaint, on the subscribers, at their office, No. 8 Nassau street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of five thousand dollars, besides the costs and disbursements of this action.

Dated New York, February 8th, 1871.

GRAY & DAVENPORT,
Plaintiffs' Attorneys, 9 Nassau St.

To the defendant:

35 You will please take notice that the complaint in the above-entitled action was this day filed in the office of the clerk of the city and county of New York, in the new county court-house in said city.

Dated New York, February 16th, 1871.

GRAY & DAVENPORT,
Plaintiffs' Attorneys.

Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. STEWART
ag'st
TRYON REAKIRT.

No. 1.

CITY & COUNTY OF NEW YORK, *ss:*

J. A. DAVENPORT, of said city, being duly sworn, says:

That he is one of the attorneys for the plaintiffs in above-entitled action. That on the 16th day of February, 1871, an order was duly made herein for service of the summons in this action upon the defendant, Tryon Reakirt, by publication, the said defendant not being a resident of this State, a copy of which order is hereto annexed. That the summons and complaint in said action were duly filed in the office of the clerk of the city and county of New York on the day last aforesaid, as appears by the affidavit of John P. Otis, hereto annexed. That the said

36 summons has been duly served in accordance with the terms of said order by publication and by mailing the same with a copy of the said complaint to the said defendant, as appears by the affidavits of William McCoy, foreman in the office of the New York Star, Gilbert Vale, foreman in the office of the New York Leader, and

of John P. Otis, which affidavits are hereto annexed, but that no answer or demurrer herein by said defendant has been served on the plaintiffs' attorneys herein or either of them, and said defendant has not appeared in the said . That twenty days have elapsed since the end of the six weeks, during which the said summons was published as aforesaid.

Deponent further says that on the 9th day of February, 1871, an attachment against the property of said Tryon Reakirt was duly issued in this action and delivered to the sheriff of the said county of New York, by whom the same was, on the said 9th day of February, 1871, and at the city of New York, levied on property belonging to the said defendant, consisting of balances remaining to the credit of said defendant in the city of New York, to wit, Messrs. E. D. Randolph & Co., Messrs. Evans, Wharton and Co., of said city, and amounting in value in the aggregate to eleven thousand dollars, or thereabouts; that said property still remains in the hands of the said parties, subject to the further action of this court.

(S'd) J. A. DAVENPORT.

Sworn to before me this 22d day of April, 1871.

(S'd) JAS. H. WORDEN,
Comm'r of Deeds, N. Y. Co.

37 Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. Stewart *ag'st* TRYON REAKIRT. } Suit No. 1.

At a special term of said court held in and for the city and county of New York, at the new court-house in said city, on the 22d day of April, 1871.

Present, Hon. John R. Brady, justice.

Upon the summons and complaint duly filed herein on the 16th day of February, 1871, and upon the order for service of the summons herein upon the above-named defendant by publication, and on reading and filing the annexed affidavits of John P. Otis, William McCoy, and Gilbert Vale, by which it appears that said service was duly made in accordance with said order of publication, and the affidavit of J. A. Davenport, reciting the proceedings had, by which it further appears that twenty days have elapsed since the said service was complete, and that no answer or demurrer has been served on plaintiffs' attorneys herein, or any appearance made by said defendant, and that an attachment has issued herein and levied upon property belonging to the said defendant:

Now, on motion of Gray and Davenport, attorneys for said plaintiffs, it is ordered that it be referred to Jerome Buck, esq., of New
38 York, counsellor-at-law, to take proof of the demand alleged in the said complaint and the amount due thereon, and to examine the plaintiffs or any one of them, or their agent or agents, on oath, respecting any payment that may have been made to the said plaintiffs or either of them, or to any one for the use of the said plaintiffs or either of them, and to report to the court with all convenient speed.

(S'd) Ent. J. R. B.

A copy.

CHA'S E. LEOW, *Clerk.*

E. M. P.

39 *Ex. A. J. B., referee.*

New York supreme court.

BENTON K. JAMISON, W'M M. STEWART, *ag'st* TRYON REAKIRT. } Suit No. 1.—Minutes of testimony, April 22d, '71.

M'r Davenport, of counsel for plaintiff, and Benton K. Jamison, pl'ff.

BENTON K. JAMISON, pl'ff, being duly sworn says: I am member of firm of pl'ffs, & W'm M. Stewart is the other partner, and do business in the city of Philadelphia & State of Pennsylvania. The defendant obtained from me $10,000 on the notes purporting to be drawn by O. S. Janney & Co., to the amount of about $19,000, which he deposited as collateral for the loan. On discovering these notes to be forgeries, which I discovered afterwards, about 6th of Feb'y, 1871, he acknowledged to me that they were forgeries; whereupon I demanded repayment of the money & procured from him $5,000 on a/c. He afterwards ran away, & I have not seen him since; don't know where he is. He has not paid, nor anybody for him, any part of the $5,000 still due. He has not paid, nor no one has paid for him, to self, or either of firm, or any one, for the use of pla't'ff, or either of them, any other sum. I would not have loaned this money to Reakirt without collateral. I considered the collateral as an essential part of my contract with him. Reakirt represented these notes which he held of O. S. Janney & Co. were made by Janney & Co., were given in settlement of partnership business on dissolution of the firm; that he had been a partner in the firm of Janney & Reakirt. The notes were given on dissolution
40 of Janney & Reakirt. He first borrowed $10,000 & afterwards paid $5,000. Then he afterwards borrowed $5,000 again on the same collateral, which made it still the same amount borrowed. When the forgery was discovered he owed $10,000. None of the notes were due when the forgery was discovered. In demanding repayment I found the notes were a forgery. I demanded restitution.

(S'd) B. K. JAMISON.

Sworn and subscribed before me this 22d day of April, 1871.

(S'd) JEROME BUCK,
Referee.

GEORGE BULL, witness for plai'ffs, being duly sworn says: I know the pl'ffs in this suit & have met def't Reakirt. I have seen notes on which Jamison made loan of $10,000. There are three of them, amounting in aggregate to $19,000. I know them to be forgeries. They purported to by drawn by O. S. Janney & Co. to the order of Reakirt and Co., & were endorsed by Reakirt & Co. They all bear date Sept. 1st, 1870. One of them is for $6,180, payable in six months after date; another, $6,360 at 12 months, and another one of for $6,540 at 18 months. These notes were forge' by Reakirt on O. S. Janney & Co.

(S'd) GEO. BULL.

Sworn & subscribed before me this 22d day of April, 1871.

(S'd) JEROME BUCK,
Referee.

41 Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. Stewart *ag'st* TRYON REAKIRT. } Suit No. 1.

To the supreme court of the State of New York:

I, the undersigned, appointed by this court a referee to take proof of the demand alleged in the said complaint, and the amount due thereon, and to examine the plaintiffs, or either of them, or their agent or agents, on oath, respecting any payments that may have been made to the said plaintiffs, or either of them, or to any one for the use of the said plaintiffs, or either of them, do respectfully report that I have taken proof of the facts and circumstances stated in said plaintiffs' complaint, and have examined Benton K. Jamison, one of said plaintiffs, on oath, as to any payments which may have been made to said plaintiffs, or either of them, or to any person for the use of said plaintiffs, or either of them, on account of the demand mentioned in said complaint, and which ought to be credited thereon, the minutes of which said proof and examination are hereunto annexed, marked Exhibit A.

And I do find as matters of fact—

1. That the plaintiffs in said action, Benton K. Jamison and William M. Stewart, are partners, doing business in Philadelphia, Pennsylvania, under the firm name & style of B. K. Jamison & Co.

42 2. That at sundry times before the 6th day of February, 1871, the defendant, Tryon Reakirt, borrowed of said plaintiffs, and said plaintiffs had loaned to said defendants, sundry sums of money; that at or before the loan of said moneys, and as an inducement to the loaning of the same, defendant deposited with plaintiffs, as collateral security for the repayment of the said loans, three certain promissory notes, each dated September 1st, 1870, and purportingto be made by certain parties under the name & style of O. S. Janney & Co., to the order of certain parties under the name and style of Tryon Reakirt & Co., one of said notes being for $6,180, payable six months after the date thereof, another for $6,360, payable twelve months after the date thereof, & a third for $6,540, payable eighteen months after the date thereof; that defendant represented the said notes to be the notes of the firm of O. S. Janney & Co., and to have been paid and delivered to defendant for value; that plaintiffs supposed the said notes to be genuine, and made the said loans on the credit of the said notes, and relied on the said notes as security for the said loans.

3d. That the signatures of O. S. Janney & Co. on said notes were forged by Tryon Reakirt, the said defendant, and that the said notes were without value, and the said representations of defendant were false and fraudulent, & said moneys were fraudulently obtained by said defendant from said plaintiffs.

4. That plaintiffs discovered said forgery on or about the 6th day of February, 1871, and that there remained at that time a balance

43 unpaid, amounting to the sum of ten thousand dollars, of the moneys which said defendant had so fraudulently obtained from said plaintiffs; *that plaintiffs—; that plaintiffs* thereupon demanded of said defendant restitution of the moneys so fraudulently obtained, and that defendant thereupon acknowledged that said notes were forgeries, and restored to said plaintiffs five thousand dollars of said moneys.

5. That the sum of five thousand dollars of the said moneys still

remain due, and have never been restored by said defendant, and no payment of any part of said five thousand dollars has ever been made to said plaintiffs, or either of them, or to any person for the use of said plaintiffs, or either of them.

And I d' find as matters of law—

That there is due to Benton K. Jamison and William M. Stewart, the plaintiffs herein, from Tryon Reakirt, the defendant herein, the sum of five thousand dollars.

Respectfully submitted.

(S'd) JEROME BUCK, *Referee.*

Dated April 22d, 1871.

44 Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. STEWART *against* TRYON REAKIRT. } Suit No. 1.

At a special term of said court, held in and for the city and county of New York, in the new court-house in said city, on the 20th day of April, 1871.

Present, Hon. John R. Brady, justice.

The summons and complaint in this action having been filed in the office of the clerk of the county of New York, on the 16th day of February, 1871, and the defendant, Tryon Reakirt, being a non-resident of this State, the service of the summons herein upon said defendant by publication having been ordered, and, pursuant to said order, the said summons having been duly published in the New York Star and the New York Leader, once in each week, in each of said papers, for six successive weeks, commencing on the 17th day of February, 1871, and a copy of said summons and complaint having been duly mailed to said defendant, addressed to Tryon Reakirt, esq., the said defendant, at Philadelphia, State of Pennsylvania, the residence of said defendant, the proper postage being prepaid thereon, and no answer or
45 demurrer having been served on the plaintiff's attorney, or appearance entered herein by said defendant, and an attachment herein having been issued against and levied upon property belonging to the defendant, Tryon Reakirt, and proof thereof made by the affidavit of J. A. Davenport, heretofore filed in this action, and on due proof of the said service of the summons and of the said default of the said defendant in this action of the issuing and levying of said attachment, it having been referred to Jerome Buck, esq., a counsellor of this court, to take proof of the demand alleged in the complaint herein, and the amount due thereon, and to examine the plaintiffs, or either of them, or their agent or agents, on oath, respecting any payments that may have been made to the said plaintiffs, or either of them, or to any one for the use of the said plaintiffs, or either of them, and to the court with all convenient speed. Now on redding and filing the report of said referee, with the minutes of evidence thereto attached and marked Exhibit A, by which report it appears that due proof has been made of the demand alleged in said complaint, and that Benton K. Jamison, one of the plaintiffs herein, has been duly examined as to such payments, and that no payment of any part of the said demand has ever been made to said plaintiffs, or either of them, or to any one for the use of said plaintiffs, or either of them, and that there is due on said demand to Benton K. Jamison and William M. Stewart, the plaintiffs herein, from Tryon
46 Reakirt, the defendant herein, the sum of five thousand dollars

($5,000.00;) and on redding and filing an undertaking in the sum of five thousand two hundred dollars, with two sureties approved by the court, produced by said plaintiffs, that said plaintiffs will abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment herein to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment in case the defendant or his representatives shall apply and be admitted to defend this action, and shall succeed in such defence; and on motion of Gray & Davenport, the attorneys for said plaintiffs, it is ordered that the plaintiffs, Benton K. Jamison and William M. Stewart, have judgment against the defendant, Tryon Reakirt, for the sum of five thousand dollars, together with the costs & disbursements of this action, to be adjusted by the clerk of this court.

Ent.

J. R. B.

47 Supreme court, New York County.

BENTON K. JAMISON AND WILLIAM M. Stewart *ag'st* TRYON REAKIRT. } Suit No. 1.

It having been ordered by this court in the above-entitled action that Benton K. Jamison and William M. Stewart, the plaintiffs in said action, have judgment against Tryon Reakirt, the defendant therein, for the sum of five thousand dollars, together with the costs and disbursements of said action, to be adjusted by the clerk of said court, and the said costs and disbursements having been duly adjusted by said clerk at the sum of one hundred & seventy-six dollars and eighty-two cents; now, on motion of Gray & Davenport, attorneys for said plaintiffs, it is hereby adjudged and decreed that the said plaintiffs, Benton K. Jamison and William M. Stewart, do recover of the said defendant, Tryon Reakirt, the said sum of five thousand dollars, with the sum of one hundred & seventy-six dollars and eighty-two cents costs and disbursements, amounting in the whole to the sum of five thousand one hundred & seventy-six dollars and eighty-two cents, ($5,176.82.)

(Endorsed:) Filed April 25, 1871, at 11 h's & 12 m.

48 The people of the State of New York to the sheriff of the city and county of New York, greeting:

Whereas judgment was rendered on the twenty-fifth day of April, one thousand eight hundred and seventy-one, in an action in the supreme court of the State of New York, in the first judicial district, between Benton K. Jamison & William M. Stewart, plaintiffs, and Tryon Reakirt, defendant, in favor of the said Benton K. Jamison & William M. Stewart against the said Tryon Reakirt for the sum of five thousand one hundred & seventy-six & $\frac{82}{100}$ dollars, as appears to us by the judgment roll, filed in the office of the clerk, in the city and county of New York. And whereas the said judgment was docketed in your county on the twenty-fifth day of April, in the year one thousand eight hundred and seventy-one, and the sum of five thousand one hundred and seventy-six dollars and eighty-two cents is now actually due thereon: Therefore, we command you that you satisfy the said judgment out

of the personal property of the said judgment debtor within your county, or if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor on the day when the said transcript was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution within sixty days after its receipt by you to the clerk of the city and county of New York.

Witness Hon. D. P. Ingraham, presiding justice at the county
49 court-house, New York City, the twenty-sixth of April, one thousand eight hundred and seventy-one.

GRAY & DAVENPORT,
Attorneys for Plaintiff, 9 Nassau Str't, N. Y.

(Endorsed:) Filed May 3d, 1871.

(Endorsed:)

Rec'd April 26th, 1871, 10.20 a. m.
Recieved am't of within execution in full satisfaction.

GRAY & DAVENPORT,
Pl'ff's Att'ys.

Satisfied.

M. T. BRENNAN,
Sh'ff.

$34, by J. O. S.

N. Y. supreme court.

BENTON K. JAMISON & WILLIAM M. STEWART
against
TRYON REAKIRT.
} No. 1.—1821.

Execution to New York County.
Pl'ff's att'ys, Gray & Davenport, 9 Nassau st., N. Y.

Sheriff of New York County:

Levy & collect of the defendant herein $5,176.82, with interest thereon from the 25th day of April, 1871, besides your fees, poundage, &c., and return this execution within 60 days after its receipt by you to the clerk of New York County.

GRAY & DAVENPORT,
Pl'ff's Att'ys, 9 Nassau st., N. Y.

Rec'd April, 1871.

GUMBLETON,
Sheriff.

50 All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness Albert Cardozo, justice, at the city of New York, the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-one, of our Independence the ninety-sixth.

CHA'S E. LOEW,
Clerk.

I, Albert Cardozo, presiding justice of the supreme court of the State of New York, for the city and county of New York, do hereby certify that Charles E. Loew, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York, and clerk of

said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify, that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, July 18th, 1871.

ALBERT CARDOZO,
Justice U. S. Supreme C't, Presid. Judge.

STATE OF NEW YORK,
City & County of New York, ss:

I, Charles E. Loew, clerk of the supreme court of said State, in and for the city and county of New York, do hereby certify that Albert Cardozo, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the
51 city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereto set my hand and affixed the seal of the said court this 18th day of July, 1871.

CHA'S E. LOEW,
Clerk.

Showing judgment entered therein April 25, 1871, and execution thereon April 26th, 1871. Also assignment to the plaintiffs as assignees of the estate of Tryon Reakirt, a bankrupt, dated May 1st, 1871.

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF TRYON REAKIRT, BANKRUPT.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Know all men by these presents, that Samuel Dickson, of the city of Philadelphia, and State of Pennsylvania, attorney at law, and Spencer M. Janney, of the same place, druggist, have been duly appointed assignees in said matter: Now, therefore, I, Joseph Mason, one of the registers in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to the said Samuel Dickson and Spencer M. Janney, assignees as aforesaid, all the estate, real and personal, of the said Tryon Reakirt, bankrupt aforesaid, including all the property of whatever kind of which he is possessed or in which he was interested or entitled to have on the thirteenth day of February, A. D. 1871, with all his deeds, books,
52 and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act; to have and to hold all the foregoing premises to the said Samuel Dickson and Spencer M. Janney and their heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have herewith set my hand and caused the seal of said court to be affixed, this first day of May, A. D. one thousand eight hundred and seventy-one.

{ SEAL DIS'T C'T }
{ U. S. E. D. P'A. }

J. MASON,
Register in Bankruptcy.

And it was also agreed to be admitted that the proceedings in bankruptcy against Tryon Reakirt were commenced by the filing of a creditor's petition on the 13th of February, 1871. Also, that defendant had actual knowledge on the 21st of February, 1871, that such proceedings were pending. Also, that the collateral notes were forgeries.

And both sides closed:

Whereupon defendant's counsel asked the court to instruct the jury as follows:

I. That the plaintiffs cannot recover the five thousand dollars paid by Tryon Reakirt to the defendants through Mr. Jamison on the 6th
53 day of February, 1871, unless it is shown that said Reakirt voluntarily sought the defendant for the purpose of giving defendant a preference over his other creditors.

2nd. That if the said five thousand dollars was paid by Tryon Reakirt to Mr. Jamison under the apprehension of a prosecution for forgery, it was not a preference under the bankrupt law, and the plaintiffs cannot recover.

3d. That the payment by Tryon Reakirt of the said five thousand dollars was not a preference within the meaning of the bankrupt law "if originating bona fide in the urgency of the creditor."

4th. That the fund recovered by the defendant through B. K. Jamison & Co., in the city of New York, from the said Tryon Reakirt, was received under adverse proceedings in due course of law, and the possession of the said fund having passed to defendants under a legal recovery prior to the appointment of the plaintiffs to be assignees of the bankrupt, the title of defendant to said fund is good in law, and the plaintiffs are not, therefore, entitled to recover the same in this suit.

5th. That the supreme court of New York having acquired jurisdiction prior to the filing of the petition in bankruptcy against said Tryon Reakirt in the city of Philadelphia, and said court having proceeded in said case according to law, to final judgment and execution before the appointment of the plaintiffs as assignees of said Reakirt's estate, without notice, publication, or service of the warrant within the jurisdiction of the said court, and no application having been made to the said
54 court for a dissolution of the suit, the said proceedings were legal and binding and conferred a good title to the fund recovered in said suit upon the plaintiffs therein, and in consequence thereof the assignees are not entitled to recover said fund.

6th. That the fund recovered in the supreme court of New York was not obtained or held by virtue of an attachment on mesne process, but by a regular action of assumpsit by original summons, adverse in character, which proceeded legally and regularly to find judgment and execution, under which said fund was recovered without any suggestion or notice to said court of an adjudication of bankruptcy, and was not a case falling within the meaning of the 14th section of the act of Congress. Consequently the plaintiffs are not entitled to recover the said fund in this suit.

7th. That the attachment issued in the said suit in the supreme court of New York was merely incidental thereto, and a technical dissolution of said attachment did not in any way affect or stop the suit, and the same having proceeded in due course of law to final judgment and execution, the technical dissolution of said attachment did not in any way affect the validity of said judgment and execution, and the said fund having been recovered and received by the defendant under and by virtue of said execution, not depending upon any process of attachment,

they acquired a good title thereto, and the plaintiffs cannot recover the same in this suit.

55 8th. If the jury believe from the evidence in the cause that Tryon Reakirt obtained money from the defendant by means of forged collaterals and on false and fraudulent representations, and that the defendant, seeking restitution of the money thus fraudulently and criminally obtained from them, recovered and secured the money which is the subject-matter of this suit in restitution of the money thus fraudulently and criminally obtained, the plaintiffs cannot recover.

9th. That there is no evidence in the cause to show that Tryon Reakirt had committed an act of bankruptcy at the time the money returned by him to defendant was paid over to M'r Jamison, and the plaintiffs cannot recover it in this suit.

10th. Withdrawn.

11th. That under all the circumstances of the case the plaintiffs are not entitled to recover, and the verdict should be for the defendant.

56 The Court then charged the jury as follows:

Tryon Reakirt was adjudged a bankrupt under proceedings commenced on the 13th of February, 1871. The plaintiff became the assignee in bankruptcy. The bankrupt's credit had been good until the 6th February, 1871, when it was discovered that he had committed forgeries to the amount of $100 M. Benton K. Jamison on that day learned that certain paper purporting to be notes of O. S. Janney & Co., deposited with the defendants to secure a loan to Reakirt of $10 M, had been forged by him. M'r Jameson had negotiated this loan. He was a director of the defendants, and in all that followed acted on their behalf. On the afternoon of the same day he had an interview with Reakirt, and used language which imported that R. would probably be prosecuted criminally if he did not secure the bank. R. endeavored to satisfy Jamison by assurances that his, R.'s, family, or some one of them, would pay his liabilities of this kind, but admitted that they amounted to more than $100 M. This did not satisfy M'r Jameson, who insisted on security. The result was that he obtained on the spot two checks or money-orders, one upon Richards & Thompson for $3 M, the other upon Evans, Wharton & Co. for $2 M, both of which were paid, the former at Philadelphia, the latter at New York. M'r J. handed over the $5,000 thus received to the defendants. He went to New York; and there, on Feb. 8th, (two days later,) instituted, in the name of his own firm of B. K. Jamison & Co., a suit against Reakirt, under which an attach-

57 ment was levied upon certain balances to Reakirt's credit in the hands of parties there. Under this proceeding the plaintiffs' attorneys at New York received the gross amount of $5,776$\frac{82}{100}$, out of which were paid charges, leaving the net amount of $4,559$\frac{76}{100}$. This amount of $4,559$\frac{76}{100}$, in addition to the former sum of $5 M, Mr. Jamison received and paid over to the defendants. The money was received for these amounts together, $9,559$\frac{76}{100}$. The present action is brought by the assignee in bankruptcy for the benefit of the general body of R.'s creditors.

The defendants by receiving the moneys from M'r Jamison adopted his acts and made them their own, so that he must be considered as having been their authorized agent in the transactions in question.

The demand for the $5,000 should be considered as distinct from the demand for the $4,559$\frac{76}{100}$.

As to the $5,000, the demand is founded upon the 35th section of the bankrupt law of 2d March, 1867. The case may be simplified by considering the demand as founded, not upon the first part of the section,

which applies to acts committed "with a view to give a preference," but to the subsequent part of the section, which, as it may be abridged for the purposes of the present controversy, enacts that if any person being insolvent, or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes any payment or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent or to be acting in contemplation of insolvency, and that such payment, &c., is made with
58 a view to defeat the object of the bankrupt act, the assignee may recover the property or the value thereof, as assets of the bankrupt. The provisions of the latter enactment are not essentially dependent upon any question of preference in the special distinctive sense of the word.

Here it may be observed that the knowledge of an agent obtained in transacting the business of his principal is considered in law as knowledge of the principal. Therefore, whatever M'r Jamison knew, or had reason to believe, through information obtained in the course of the transactions in question, the defendants will be considered as having had reason to believe.

As to the limitation of six months, it will be recollected that the disposition and payment of the $5,000 occurred only about a week before the petition in bankruptcy. The two first in*in*quiries under this head are, therefore, whether Reakirt was insolvent or contemplated insolvency in the afternoon of 6th February, 1871, when the orders in question were given by him, and whether M'r Jameson, when he received them, had reasonable cause to believe R. insolvent or to be acting in contemplation of insolvency.

The testimony of M'r Jamison makes it difficult to separate these inquiries. The jury will probably consider them as inseparable, because he testifies that Reakirt then told him that he had committed forgeries to an amount exceeding $100,000, and that he relied upon one or more of his relations to relieve. If the jury consider the substance and
59 effect of the testimony to be that he expressed no reliance upon anything but the feelings or affections of a relation or relations who were supposed rich, the question of insolvency becomes a very simple one. If a man whose own resources did not enable him to meet his admitted liabilities relied only upon hope from the benevolence or affection of others, the jury will probably have no difficulty in finding that he was insolvent. M'r Jameson says very plainly that he did not rely on any such expectation, but insisted on security. If the jury consider the evidence of insolvency, and of M'r Jameson's knowledge of it, sufficient in fact, the court say that is in law sufficient to justify them in so finding.

As to the $4,559$\frac{76}{100}$, the demand is founded upon that part of the 14th section of the bankrupt law which enacts that, by operation of law, the title to all the bankrupt's property and estate, real and personal, shall vest in the assignee, although the same was attached on mesne process as the property of the debtor. The attachment in this case was, in our opinion, an attachment on me*a*ne process, and, as such, void as against the assignee. If so, the plaintiffs are entitled to recover as to this portion of the claim.

And in answer to defendant's points, the court charged as follows:

As to the 1st, 2d, and 3d points: under the head of preference these propositions would be sound and would be affirmed, but in this case the matter depends upon the second clause of the 35th section. The
60 instruction asked is given, with the qualification that they do not apply to the second clause of the 35th section.

As to the 4th, 5th, 6th, and 7th points, the proceedings in New York were effectual to pass title, except as affected by the 14th section.

The law is as stated in the 4th and 5th points, so far as it concerns the parties to the record. The debtors paying money under the attachment were discharged, but the defence does not lie in the mouths of the defendants here, because it is money which they have obtained by attachment on mesne process, and the attachment was within four months next preceding the commencement of the proceedings in bankruptcy. The points, therefore, are affirmed, except as affected by the 14th section.

On the 6th and 7th points the instructions are refused. The money was recovered through the attachment on mesne process, and we do not see on the record any recovery except through such attachment.

On the 8th point the instruction asked is refused. The plaintiff could not recover at all except for the provisions of the bankrupt law; but there is nothing in this point to prevent his recovery under that law.

The 9th point is refused. It is immaterial whether an act of bankruptcy had been committed. It is sufficient for this case that the act was committed afterwards.

The 11th point is refused.

Def't's counsel withdrew the 10th point.

Defendant's counsel thereupon excepted to the answers given by the court to def't's 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 11th points.

61 And thereupon the counsel for the said defendant, The West Philadelphia Bank, in manner and form as aforesaid, did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to do not appear upon the record:

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judges, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this sixth day of April, A. D. 1874.

W. McKENNAN. [L. S.]
JOHN CADWALADER. [L. S.]

62 Know all men by these presents, that we, Isaac W. Hughes, M. D., of 40th and Chestnut streets, in the city of Philadelphia, and David M. Lane, of South 40th street, in said city, are held and firmly bound unto Samuel Dickson and Spencer M. Janney, assignees of the estate of Tryon Reakirt, a bankrupt, in the full and just sum of twenty thousand ($20,000) dollars, to be paid to the said Samuel Dickson and Spencer M. Janney, assignees as aforesaid, their certain attorney, their successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a circuit court of the United States for the eastern district of Pennsylvania, in a suit depending in said court to April sessions, 1871, No. 38, between Samuel Dickson and Spencer M. Janney, assignees of the estate of Tryon Reakirt, bankrupt, plaintiffs, and The

West Philadelphia Bank, defendant, judgment was recovered against the said West Philadelphia Bank; and the said West Philadelphia Bank having obtained their writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel Dickson and Spencer M. Janney, assignees as aforesaid, citing and admonishing to be and appear at a Supreme Court of the United States to be holden Washington the second Monday of October next:

Now the condition of this obligation is such that if the said
63 West Philadelphia Bank shall prosecute their writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

ISAAC W. HUGHES. [SEAL.]
DAVIS M. LANE. [SEAL.]

Sealed and delivered in the presence of— The words "second" and "October" interlined in last line of first page before execution—
SAMUEL BELL,
W. GRIER HIBLER.

Approved.

JOHN CADWALADER, *Judge.*

17th February, 1875.

64 UNITED STATES OF AMERICA, *ss:*

To Samuel Dickson and Spencer W. Janney, assignees in bankruptcy of Tryon Reakirt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, wherein The West Philadelphia Bank is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-five.

W. STRONG,
A. J. S. C. U. S.

PHILADELPHIA, *ss:*

Howard J. Nece, being duly sworn, says that he served a true copy of the above citation on Sam'l Dickson, esq., and also upon Spencer M. Janney, esq., by leaving the same at their respective places of business, in the city of Philadelphia, this 27th day of February, 1875.

HOWARD J. NECE.

Sworn and subscribed before me this 27th day of February, 1875.

SAMUEL BELL,
U. S. Commissioner.

65 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between Samuel

Dickson and Spencer M. Janney, assignees of Tryon Reakirt, bankrupt, plaintiffs, and The West Philadelphia Bank, defendants.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this eighth day of April, A. D. 1875, and in the ninety-ninth year of the Independence of the United States.

[SEAL.] SAMUEL BELL,
Clerk Cir. C't U. S., E. D. of Pa.

66 UNITED STATES,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because, that in the record and process, and also in the rendering of judgment in a suit before you between Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of Tryon Reakirt, plaintiffs, and The West Philadelphia Bank, defendants, in a plea of trespass on the case, a manifest error has *entervened*, to the great damage of the said West Philadelphia Bank, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the *the* Supreme Court of the United States at the city of Washington, on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Philadelphia, this seventeenth day of February, A. D. one thousand eight hundred and seventy-five, and in ninety-ninth year of the Independence of the said United States.

SAMUEL BELL,
Clerk C. C. U. S., E. D. Pa.,
Per W. GRIER HIBLER.

(Indorsed:) 38. April sess., 1871. Bank *v.* Dickson, et al. Writ of error.

Allowed with stay of proceedings during the pendency of this writ, bond having been filed and sureties approved.

W. STRONG, *J.*

(Indorsement on cover:) No. 66. The West Philadelphia Bank, plaintiff in error, vs. Samuel Dickson and Spencer M. Janney, assignees in bankruptcy of Tryon Reakirt. E. Pennsylvania C. C. U. S. Filed 20th April, 1875.

Supreme Court of the United States,

October Term, 1877.

THE WEST PHILADELPHIA BANK,
PLAINTIFF IN ERROR,
vs.
SAMUEL DICKSON ET AL., ASSIGNEES OF TRYON REAKIRT, A BANKRUPT.
No. 66.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiffs' bill of particulars reads as follows, (Rec., page 3:)

"Plaintiffs claim to recover, UNDER COMMON COUNTS, "money received from Tryon Reakirt, or on his account, "through B. K. Jamison or B. K. Jamison & Co., of "which the following is believed to be a correct state- "ment, viz:

"ITEM No. 1. Order or check paid in February, "1871, by Richard Thompson to B. K. Jamison "or B. K. Jamison & Co..... ....$3,000

"ITEM No. 2. Draft paid by Evans & Wharton to "same, for 2,000

"ITEM No. 3. Collections made in the year 1871, "in New York, for the benefit of the bank, in "sundry attachments in the name of Benton K.

" Jamison and Wm. M. Stewart, trading as B.
" K. Jamison & Co., against E. D. Randolph &
" Co. and E. Wharton & Co., amounting to five
" thousand and eight hundred dollars, and up-
" wards .....$5,800"

The pleas were *non assumpsit*, set-off, and payment, with leave to put the special matter in evidence, &c.

Rec., p. 4.

On which issue was joined, a trial by jury had, a verdict given for $9,559.76, April 6, 1874, in favor of the assignees and against the bank, on which verdict judgment was entered April 18, 1874, (Rec., pp. 4, 5,) and on February 17, 1875, this writ of error was obtained by the bank.

Rec., p. 28.

HISTORY OF THE CASE.

The West Philadelphia Bank is a corporation established under the laws of Pennsylvania.

Tryon Reakirt, a young man, was a member of the firm of Tryon Reakirt & Company, composed of himself and his father, John Reakirt, wholesale druggists of Philadelphia.

Both individuals and the firm enjoyed excellent commercial credit up to February 6, 1871.

Testimony of Richards & Jamison, Rec., pp. 8, 9.

Young Reakirt becoming very heavily involved in stock speculations, resorted to forgery to obtain money. On or about December 24, 1870, he obtained $10,000 from this bank on his own personal note at 2, 3, and 4 months, giving the bank as collateral security for the repayment of

the same the three following notes of O. S. Janney & Co., to the order of and endorsed by Tryon Reakirt & Co.:

Note	September	1,	1870,	6	months'	date.....	$6,180
"	"	"	"	12	"	"	6,360
"	"	"	"	18	"	"	6,540
							$19,080

See Jamison's testimony, Rec., p. 9.

February 6, 1871, these collaterals were discovered to be forgeries; whereupon the bank, acting through its agent and director, B. K. Jamison, sought for young Reakirt, and obtained an interview with him the same day between 4 and 5 o'clock P. M., at the office of Richards & Thompson, the bankers and brokers of young Reakirt. A demand for the immediate return of the bank's money, and a threat that on failure to comply the bank would proceed against him "in a very summary manner," resulted in a restoration to the bank of $3,000 by check on Richards & Thompson, February 6, 1871, and $2,000 by check on Evans, Wharton & Co., New York, February 7, 1871. *These two amounts are the first two items in the bill of particulars.*

See Jamison's testimony, Rec., p. 8.

February 8, 1871. The bank setting forth the above facts, the rescission and the partial restitution of its money, brings suit against Tryon Reakirt for $5,000, accompanied by an attachment on February 9, 1871, in the supreme court, county of New York, and recovered April 26, 1871, $4,559.76.

Rec., p. 9 to 22 inclusive.

The verdict here embraces the three items Nos. 1, 2, 3, for $3,000+$2,000+$4,559.76=$9,559.76.

Rec., pp. 24, 25.

The New York court never had judicial notice of the bankrupt proceedings. Suit was entered, regular proceedings had, judgment rendered, execution awarded, and *returned satisfied* BEFORE the 1st May, 1871, *the date of the assignment.*

Rec., pp. 21, 22.

Neither Tryon Reakirt's note to the bank nor the forged collateral notes had matured when items Nos. 1 and 2 were received by the bank.

Testimony of Jamison, Rec., p. 9.

The bankruptcy proceedings (*involuntary*) were brought *February* 13, 1871, (Rec., p. 23.) Reakirt had left the country *February* 7, 1871, (Rec., pp. 7 and 17.) The date of the adjudication in bankruptcy does not appear in the record. The assignment is of May 1, 1871.

Rec., p. 22.

On this statement of facts the following questions arise:

FIRST. Had the bank the right, on discovery of the forgeries, to seek immediate pecuniary reimbursement of the criminal? and was the restitution of the amount by the criminal of what the bank had been defrauded any violation of the spirit or any defeat of the operation of the United States bankrupt laws?

SECOND. Did the United States bankrupt laws deny the

bank the right to resort to *duress per minas* without breach of peace, to make the criminal disgorge the money obtained by a crime from the bank?

THIRD. Did the United States bankrupt laws oblige the bank *to identify its money* in the hands of the criminal?

FOURTH. Was the bank bound under the United States bankrupt laws, on discovery of the crime, to hold its hand or seek redress civilly in the bankrupt court *only*, and for the benefit of *the mass of creditors?*

FIFTH. Under the circumstances of this case, what was the legal and moral duty of the officers of the bank towards its stockholders in dealing with Tryon Reakirt?

SIXTH. Is the validity of the transaction affected in any way by the hope and expectation of the criminal that it would prevent a prosecution for felony?

ASSIGNMENT OF ERROR.

The lower court erred:

FIRST. In determining the legal relations between the bank and the bankrupt. The bank was not a *creditor* of the bankrupt, nor was the bankrupt a *debtor* to the bank, in the true and scientific meaning of those terms.

SECOND. In holding that the material facts for the jury were the insolvency of Reakirt and the knowledge thereof in the bank—both questions being irrelevant; and in charging, "If the jury consider the evidence of insolvency and "of Mr. Jamison's knowledge of it sufficient in fact, the "court say that is sufficient in law to justify them in so "finding;" *i. e.*, for plaintiffs as to the $3,000 and $2,000.

THIRD. In mistaking the entire scope and meaning of the bankrupt laws of the United States, and construing them so as to prevent repentance and defeat all restitution by a criminal.

FOURTH. And in concluding in favor of a party *qui certat de lucro captando*, rather than in favor of the bank *qui certat de damno vitando.*

FIFTH. And in an erroneous application of the 14th section of the bankrupt act.

SIXTH. In charging, "The attachment in this case was, "in our opinion, an attachment on mesne process, and, as "such, void as against the assignee," referring to the proceedings in New York.

SEVENTH. And in charging on defendants first, second, and third points: "Under the head of preference, these propositions would be sound and would be affirmed, but in "this case the matter depends upon the second clause of "the 35th section. The instruction is given, with the qualification that they do not apply to the second clause of "35th section."

EIGHTH. And in qualifying the 4th, 5th, 6th, and 7th points, by charging, "The proceedings in New York were "effectual to pass title, except as affected by the 14th section."

NINTH. And in refusing to charge as requested in 6th and 7th points made by defendants, reading as follows:

"6th. That the fund recovered in the supreme court of "New York was not obtained or held by virtue of an attachment on mesne process, but by a regular action of "*assumpsit* by original summons, adverse in character,

" which proceeded regularly and legally to final judgment " and execution, under which said fund was recovered " without any suggestion or notice to said court of an ad- " judication of bankruptcy, and was not a case falling " within the meaning of the 14th section of the act of Con- " gress. Consequently the plaintiffs are not entitled to " recover the said fund in this suit.

" 7th. That the attachment issued in the said suit in the " supreme court of New York was merely incidental thereto, " and a technical dissolution of said attachment did not in " any way affect or stop the suit, and the same having pro- " ceeded in due course of law to final judgment and exe- " cution, the technical dissolution of said attachment did " not in any way affect the validity of said judgment and " execution, and the said fund having been recovered and " received by the defendant under and by virtue of said " execution not depending upon any process of attachment, " they acquired a good title thereto, and the plaintiffs can- " not recover the same in this suit."

TENTH. And whilst refusing so to charge, as requested in the 6th and 7th points just quoted, the lower court erred in adding to their refusal: " The money was recov- " ered through the attachment on mesne process, and we " do not see on the record any recovery, except through " such attachment."

ELEVENTH. And in refusing to charge as requested in the defendant's eighth point: " 8th. If the jury believe, " from the evidence in the cause, that Tryon Reakirt ob- " tained money from the defendant by means of forged " collateral, and on false and fraudulent representations, " and that the defendant, seeking restitution of the money " thus fraudulently and criminally obtained from them,

" recovered and secured the money which is the subject-
" matter of this suit in restitution of the money thus fraud-
" ulently and criminally obtained, the plaintiffs cannot re-
" cover."

TWELFTH. And in refusing to charge as requested in the 9th point: "That there is no evidence in the cause to show " that Tryon Reakirt had committed an act of bankruptcy " at the time the money returned by him to defendant was " paid over to Mr. Jamison, and the plaintiffs cannot recover " it in this suit."

THIRTEENTH. And in adding to his refusal thus to charge the words: "It is immaterial whether an act of bank-
" ruptcy had been commited. It is sufficient for this case
" that the act was committed afterwards."

FOURTEENTH. And in refusing to charge as requested in the 11th point of defendants' prayer for instructions to the " jury, as follows: "That under all the circumstances of " the case, the plaintiffs are not entitled to recover, and " the verdict should be for the defendants."

ARGUMENT.

On the 6th of February, 1871, on the discovery of the forgery, no doubt can exist that the bank had the right to pursue the criminal, and by force, not amounting to a breach of the peace, coerce him to restore the bank's money. "The reason for this is obvious, since it may " frequently happen that the owner may have this only " opportunity of doing himself justice; his goods may be " afterwards conveyed away or destroyed * * * " if he had no speedier remedy than the ordinary process " of law. If, therefore, he can so contrive it as to gain

" possession of his property again, without force or terror, " the law favors, and will justify his proceeding."

3 Blackstone's Com., * 4.

The bank pursued this course, and realized a portion of its money, say items first and second in plaintiffs' bill of particulars, amounting together to $5,000.

But, for some reasons not well understood, this simple solution to this part of the case was pronounced erroneous by the lower court, and the effort of the bank to protect itself was declared to be in violation of the provisions of the bankrupt law set forth in the latter portion of section 35 of bankrupt act, and now embodied in Rev. Stat., Article 5129. This article pronounces void all acts made in fraud of creditors, or done in any way " to impair, hinder, " impede, or delay the operation and effect, or to evade any " of the provisions of the bankruptcy system of the United " States." The lower court expressly admits there is no question of fraudulent preference in this case. And in a very recent case the same court admits, if the relation here had been principal and agent, the right of following the property through all its changes and ramifications would undoubtedly exist. Nay, even had the agent deposited the money, and transmuted the property " *into the form of a* " *credit in a bank in the name of the agent himself*," still the principal could recover the money, *even after the bankruptcy*, and from *the assignee himself*. The judge quotes—

Bank *vs.* King, 57 Penn., 205.
Pennell *vs.* Deffel, 23 Eng. L. and E., 460.
See his opinion in Voight *vs.* Lewis, Leg. Int., Nov. 10, 1876.

But if, in the legal relation between principal and agent,

there exists *the element of trust*, which enables the former to pursue his property into no matter what shape it may pass, how much stronger must the case be when there is no legal relation whatever; when the party, *by a crime*, gets possession of another's property; and when the injured owner presses for a restoration of it or its proceeds a court of justice should say to the owner, as well as the criminal, "Refrain! not only is the transaction void, "but you will incur by doing it the pains and penalties of "the United States bankrupt law."

It seems to us this is a most striking error in regard to the scope and meaning of the national bankrupt law. Reakirt obtained $10,000 of the bank's money by a crime. No property in this amount passed or could pass to the forger. *It remained the bank's money.* It went into Reakirt's various bank accounts. It was mixed up in every possible way. It was changing its shape every day and every hour; still it cannot be denied that it was the property of the bank, and not of the bankrupt.

United States *vs.* McRae, L. R., 8 Equity, 74.
Pinkett *vs.* Wright, 2 Hare, 120.
Sinclair *vs.* Wilson, 20 Beavans, 324.

And even if it be insisted that the bank, if plaintiff, would be bound to identify the money in case of a contest with creditors represented by their assignee, this obligation of proof cannot rest upon us now, whilst we are defendants. The proof must be conclusive, and made by the plaintiffs, that the bank has got the moneys belonging both legally and equitably to the bankrupt, and all the presumptions of law are against the plaintiffs. The present case is infinitely stronger than—

Mays *vs.* Bank, 64 Penn., 74.

If, instead of paying to the defendant the moneys which were to the credit of the bankrupt, the bankers in this case had paid them to the bankrupt himself, it is too clear for argument the assignees could never recover for moneys had and received, as against the bankers. The payments complained of in Mays *vs.* Bank were made *subsequent* to filing the petition and the commencement of the *involuntary* bankrupt proceedings. (R. S., 4991.)

Our position is very simple. The ten thousand dollars originally credited to Reakirt never *passed to him as owner.* It never became *Reakirt's property* so that he *could surrender it to his creditors.* The bank could use "ANY MEANS" in its power to get back its own property, provided no breach of peace was committed, and the assignee has neither a legal nor an equitable title to get the property back, in an action for moneys had and received, because this money was actually and legally "AT HOME" when received by the bank.

Wiseman *vs.* Vanderput, 2 Vern., 203.
Scott *vs.* Surman, Willes, 400.
Manningford *vs.* Toleman, 1 Colly, 674.

The reply which defendants in error make to this position is that the policy of the bankrupt law forbids such a transaction; that the money received by the bankrupt from the bank at the moment the paper was discounted sank into the mass of the bankrupt's property; became inextricably involved in it, and was no longer subject to identification, and therefore could not be *followed* by the bank; in short, that the $10,000 became that *common pledge of all the creditors*, the foundation of all bankrupt laws, and the proceeds of which *must* be distributed among these creditors *pro rata.* That money has no ear-mark; that the legal relation between the bank and the bankrupt was that

of principal and agent, and before the bank can successfully defend, it must *identify its money* or trace its *product.*

This presents the very first question in this case calling for solution. Was this amount of $10,000, the original property of the bank, obtained from it by fraud, so that the property passed from the bank under a contract, though a contract under some circumstances liable to be avoided; or did the property never pass from the bank at all? We shall endeavor to show that, in either event, the judgment should be reversed; so that even if we be wrong in the position hitherto assumed, that no property passed to the forger, a discussion of the point will help to throw light upon the case.

Had the money been *stolen* from the bank, neither the right of possession nor property passes.

> Lindsey *vs.* Cundy, 1 Q. B. D., [Law Rep.,] 348–361, and many cases cited.

The test of larceny is the *animus furandi.* The money was obtained from the bank by a crime which was felonious. But another essential of larceny is *invito domino*, and inasmuch as the money was *received* by the forger and *not taken* by him, it is urged there was no larceny.

> Regina *vs.* Prince, L. R., 1 Cr. C., 150.
> Queen *vs.* Middleton, L. R., 2 Cr. C., 38.

We admit the crime here was not larceny, but forgery; and though it may be doubtful, under the English system, where stealing ends and obtaining money under false pretences begins, yet under the reprobation of the English judges themselves it is not necessary to adopt the English system in this country.

But if the crime here be forgery, and if Reakirt obtained possession of the bank's funds by means of said crime, still the consequences will not follow that the bank's money became the property of the criminal, and vested by the bankruptcy proceedings in his creditors. The bank could waive the tort and sue successfully in trover if the money was in marked pieces or susceptible of identification in the possession of the forger; or after bankruptcy, in the hands of his assignee; or for money had and received before bankruptcy in case no identification were possible.

See Voight *vs.* Lewis *ut ante*, [trover?]
Horwood *vs.* Smith, 2 T. R., 750, followed in Lindsey *vs.* Cundy, just quoted.
Scott *vs.* Surman, Willes, 407.
Taylor *vs.* Plumer, 3 M. & S., 562.
Catts *vs.* Phalen, 2 Howard, 381.
Pratt *vs.* Oliver, 3 Howard, 401.
Smith *vs.* Vogdes, 2 Otto, 186.

The idea that Reakirt, the bankrupt, could recover this money back from the bank in any action of repetition is evidently erroneous and irrational.

See notes to Marriot *vs.* Hampton, 1 Smith L. C., * 393.
Bank U. S. *vs.* Bank of Georgia, 10 Wheat., 333.

We therefore take issue at once upon the principle enunciated, that the moment the bank discounted the forged paper the proceeds of the discount vested in Reakirt as owner.

Here is a sum of money which on February 6, 1871, belonged either to the bank or to Reakirt; either the one or the other owned it; of either the one or the other it was the property. The solution of this simple question seems a

solution of the case. If the money belonged to the bank, or was owned by the bank, or was the property of the bank, Reakirt had no interest in it as owner and could convey none to his creditors.

In defining ownership, the common-law writers refer to three elements, viz: Possession, right to possession, and title. Supposing this case to be, as we have shown it is, a simple discount of commercial paper by the bank on a deposit of collateral securities, the bank would be the holder and owner of the paper discounted, and the pledgee, bailee, or special owner of the collaterals, whilst Reakirt would be the owner and proprietor, the legal and equitable holder of the money paid out by the bank, or, as is most usual, the bank passes the net amount of the discount to the credit of its customer, and the relation of debtor and creditor is established between them *eo instanti*.

In such a case, if the bank discounts counterfeit or forged paper, the customer obtaining the discount becomes liable *at once*, on discovery of the forgery by the bank, to refund the money, the proceeds of the discount, in an action for money had and received. It is quite immaterial whether the customer endorses the paper or not.

Fuller *vs.* Smith, 11 E. C. L. R., 366.

And in such a case the court says "this transaction is "in the nature of an EXCHANGE between the two parties. "The bank is the vendor of the money and the vendee of "the collateral and note; whilst Reakirt is the vendor of "the collateral and note and the vendee of the money." And, "If a person gives a forged bank-note, *there is noth-* "*ing for the money:* IT IS NO PAYMENT."

Jones *vs.* Ryde, 5 Taunton, 488.
Gurney *vs.* Wormsley, 82 E. C. L. R., 133.

If the discount be an exchange, and an exchange brought about by a felony, and rescinded before the bankruptcy, then the parties were restored to the position they occupied before the exchange was entered into. The money now sought to be recovered back never was in law the property of the bankrupt; never was the common pledge of his creditors; never could come under Articles 5128, 5129, Revised Statutes, in reference to the policy of the bankrupt laws. The attempt now made is to enable the creditors to profit by the felony at the expense of an innocent third person. "No title can be obtained through a "forgery."

Johnson *vs.* Windle, 3 Bingham N. C., 225.

The assignee, *certat de lucro captando;* the bank, *certat de damno vitando.* If the transaction be an exchange, the assignee is striving to get into his custody the money of the bank, leaving the bank "*nothing for the money.*" "*A "fair exchange is no robbery*" is doubtless true both in law and morals. "A fair exchange of equivalents injures "no one;" and, therefore, "cannot be an act of bank-"ruptcy."

Lowell's Decisions, 562.

But what is a *felonious* exchange, if not robbery within the meaning of the adage? And what would be thought of an assignee who insisted upon bringing BOTH SIDES of the exchange-account into the bankruptcy? Or, supposing that an ordinary exchange of personal property had been made between the bank and Reakirt, say of shares of stocks—those transferred by the bank all in order and in possession of Reakirt at the time of bankruptcy; those transferred by Reakirt forged and worthless in the hands

of the bank—could the assignee hold those shares transferred by the bank? Certainly not. Not even if Reakirt had sold the shares and converted them into money, and the money had been *deposited to his credit at his bankers*, as under the facts of Voight *vs.* Lewis, before quoted.

The case is only the more highly colored by Reakirt's crime; it is not essentially changed. Had the transaction been based upon real instead of forged notes, the right of the bank, in direct view of the bankrupt system, to permit the discounter to CHANGE THE SECURITIES up to the very filing of the petition of voluntary bankruptcy and up to the very declaration of involuntary bankruptcy, cannot be denied.

Sawyer *vs.* Turpin, 1 Otto, 114.

If, innocently, the discounter had pledged a forged note to the bank, and on notice he had at once replaced it, either with real commercial paper or money, and been declared a bankrupt the next day, could the assignee recover back from the bank the commercial paper or the money? Clearly not, because there is no injury to creditors. If a merchant could transfer by his bankruptcy the losses he had incurred in his business from receiving forged paper to an innocent bank for the profit of his creditors, it would be a violation of all correct principles of law and morals. "*As the tree falls so must it lie.*"

L. R., 12 Equity, 377, Sutton *vs.* Wilders.
8 H. L. C., 751, Railway Co. *vs.* Taylor.
18 Wall., 614, Espy *vs.* Bank.

But if a bankrupt corrects an innocent error by returning money obtained by him on an untrue representation, without infringing the policy of the bankrupt law, (R. S.,

5129; Montgomery *vs.* Machine Works, 2 Otto, 257,) how much stronger is the present case, where the error in the bank is produced by the crime of the bankrupt! On the discovery of the forgery, the natural impulse of the bank's officers was to seek redress in the most summary manner; and it was perfectly natural that they should look rather to the interests of the shareholders in getting back their money than to the public good in having the respectable criminal arrested and punished. We submit neither the assignee nor the creditors can take advantage of this error (*if it be one*) in the conduct of the bank's officers, and that national courts have no supervision of the crime of forgery, except under R. S., 5413 *et seq.*, and the morals of the good people of the old Commonwealth can be adequately cared for by their own legislation. All competency in your Honors to deal with Reakirt as a criminal on account of this forgery is expressly denied.

But even if your Honors hold that we cannot legally predicate of the $10,000 obtained from the bank on forged collateral, that it always continued to be the bank's property and that we must rest our right to successfully defend on the admitted fact that the sum was obtained from the bank *on a false pretence;* and that on February 6, 1871, the bank first had notice of it, then, we urge, the contract, whatever it was, was infected *ab initio* with a *latent* vice, which, when it became *patent*, authorized the bank to rescind, if it chose so to do; and this choice it exercised the moment it discovered the forgery. That the rescission was eminently just and equitable between the parties, and worked out no prejudice whatever to the creditors of the bankrupt, is clear.

The bank, it will be noticed, never hesitated on its course after the discovery. The question in all such cases is, has the obligee, having notice of the nullity of contract,

elected not to avoid the contract; or has he elected to avoid it; or has he made no election?

Clough *vs.* Railway, L. R., 7 Exch., 35, *and cases cited.*
Stevenson *vs.* Newnham, 16 L. & E., 406.
Young *vs.* Billiter, 34 L. & E., 339.

The bank chose at once to rescind. Reakirt's note was not due, and no hint of his insolvent circumstances had been bruited abroad. The bankrupt's creditors cannot say to the bank's officers, on the discovery of the forgery, "Take "no steps to get back your money or redress your wrong; "wait patiently till your money is inextricably mixed up "with the bankrupt's, and the creditors force him into "bankruptcy in the national courts. Then the judges of "those courts will see that nothing is done IN FRAUD OF "THE SYSTEM, and you will be fully satisfied by the divi- "dends which will be declared and paid by the assignee." Can ridicule, sarcasm, and contempt go farther than this in stigmatizing the United States bankruptcy system?

The bank never admitted, and does not now admit, there ever was a contract between it and the bankrupt. The bank is not claiming the dissolution or the resolution of the contract, but the absolute nullity and total avoidance of the contract, for the inherent defect therein of want of any *aggregatio mentium* on the subject-matter. It was no part of the original agreement or contract between the bank and Reakirt that when the bank should discover the forgery the contract might be dissolved.

This distinction between the rescission and the dissolution of a contract is well settled. The bank had a right to rescind at any time on account of the collaterals being forged, and could choose to exercise this right or not at its own discretion, so long as third persons were not injured, as we have already seen. The concealment of the facts

from the bank delayed its choice until February 6, 1871, the very day of the discovery of the forgery, when the rescission became a fact, and has so remained. The bank received back from the bankrupt $5,000 in cash before the commencement of the bankrupt proceedings; and also began the suit to recover the balance of their $10,000 in the New York court, not in affirmance of any contract between it and the bankrupt, but "*for the results or conse-*" *quences of a rescission, on the ground that he has already* " *exercised his right to rescind given him by the law.*"

Pearsoll *vs.* Chapin, 44 Penn. Rep., 9, and the cloud of cases cited.

It is true the suit in New York was begun by attachment before the bankruptcy proceedings had been commenced, and the law prescribes "such assignment (in " bankruptcy cases) shall relate back to the commence-" ment of the proceedings in bankruptcy, and by operation " of law shall vest the title to all such property and estate, " both real and personal, in the assignee, although the " same is then attached on mesne process as the property " of the debtor, and shall dissolve any such attachment made " within four months next preceding the commencement " of the bankruptcy proceedings." (R. S., 5044.) But the attachment is only dissolved by operation of law where the property attached belongs to and is owned by the bankrupt; and the assignment in bankruptcy must vest both the *legal and equitable* title to the attached property in the assignee. Without this conjunction of the *legal* AND *equitable* title the assignee may not go to sleep upon this "*operation of law*" dissolving the attachment; for in this case, it is submitted, the assignee is without any *legal or equitable* title to the money attached, and his inaction

in not having the attachment set aside by proper order of court, and in permitting the New York court to proceed to judgment and execution, is a ratification; and that the assignee cannot now proceed at law in assumpsit except in *strict affirmance* of these New York proceedings, which no court can set aside and annul collaterally. *Cur tamdiu tacuit?*

Phillips *vs.* Hunter, 2 H. Black, 402.
Eyster *vs.* Gaff, 2 Otto, 521, and cases cited.
Elliott *vs.* Peirsol, 1 Peters, 340.
Vaillant *vs.* Childress, 21 Wall., 642.

The assignee here claims, therefore, in affirmance and not in opposition to the New York proceedings, which have pronounced the rescission of the contract and the restoration of the money as the property of the bank and not of the bankrupt. If this be not so, in fact and in truth, and if the judgment of the New York court be not conclusive upon the assignee and the bankrupt's creditors, still it must be admitted that the burden of proof is upon the assignee to show affirmatively that the very money received by the bank is the money of the bankrupt. The identification of the money, the *onus probandi* of which rested once upon us, is now transferred to the assignee. *Ei incumbit probatio qui dicit, non qui negat.* This principle is elementary. It is a *presumptio juris* that Reakirt returned to the bank *its own money*, under the circumstances of this case.

See Pinkett *vs.* Wright, 2 Hare, 129.

"A presumption, according to the most correct use of "the term, means not (as has been sometimes erroneously "imagined) a preponderance of probability in its favor, but

" such a preoccupation of the ground as implies it must " stand good till some sufficient reason is adduced against " it; in short, that the burden of proof lies on the side of " him who would dispute it."

Whateley's Apothegms, Phila., 1856, p. 227.

The intent of the bank here is to get back its own property in kind; it is not pretended the bank had any wish to hinder or delay creditors or obtain any illegal preference. It was *no creditor* of the bankrupt on and after February 6, 1871, either in the true, scientific meaning of that term or in the light of the United States bankrupt system. The bank might, had it not chosen to rescind, have proved its claim against the bankrupt; but no court could discharge the bankrupt without payment from his obligation to the bank. If no creditor, of course the bank could receive no preference. This the lower court admits. But the restitution of $5,000 made by Reakirt to the bank must be regarded as made on February 6, 1871, and the right of the parties determined at that time. It was an admission of the bankrupt binding on the creditors that the very moneys of the bank were restored to it, and of all the facts of forgery, rescission, restitution, and an honest desire on the part of the bankrupt to repair the evil he had done. In such a case, no property, legal or equitable, in the $5,000 could vest in or pass to the assignees *after* the money had been restored to the bank; there was not even a " reputation of ownership remaining hanging around the " bankrupt;" nor " a delusion of creditors by false appear- " ances," nor " a merely colorable possession " by the bank; and if Reakirt had died, " there would not be the " least doubt that, as against his executors, the bank would " have had a perfect title."

Jones *vs.* Dwyer, 15 East., 21.
Ex parte Littledale, 31 Law & Eq., 274.
Graham *vs.* Furber, 78 E. C. L. R., 134.
Cook *vs.* Tullis, 18 Wall., 332.
Sawyer *vs.* Turpin, 1 Otto, 120.

If the strict rules of pleading be adhered to in testing the principles of law governing the case, and this is said to be the *lapis lydius* of a suit, it seems to us indisputable that the remedy of the assignee is not by any action on the case. That the single fact involved, giving character to the cause of action, is the force applied to bring about the surrender of the bank's money. Here, we have the action of *trespass, vi et armis, in substance*, and assumpsit *in form*. It is quite indisputable that the bankrupt had no cause of action on any contract, express or implied, against the bank or its agent. If he could sue the bank *at all*, it must be for tort; he might, perhaps, bring trespass for his damages, for a wrong-taking *ab initio*, and then the action would be *strictly personal*.

See 1 Smith's Leading Cases, *216, *The Six Carpenters.*

Even in Pennsylvania, where the two jurisdictions of law and equity are rapidly becoming united in the same courts, the judges are still bound to distinguish the boundaries of common-law actions.

McManus *vs.* Cassidy, 66 Penn., 262.

"Damages resulting from a tort is neither estate, credit, "nor effects."

Mann's Appeal in Sibbald's Estate, 18 Penn., 249.

It is indisputable that by force of Revised Statutes 5046, 5047, very many causes of action existing in a bankrupt are, by virtue of the adjudication of bankruptcy and the appointment of his assignee, vested in the assignee; BUT NOT ALL. The rule is subject to the exceptions stated in Revised Statutes 5045 expressly, and impliedly to others, such as are *purely personal to the debtor*, (see Huscombe *vs.* Standing, Croke's James, 187,) which need no enumeration but suggest themselves at once, and of which no more satisfactory type of the whole series could be given than the present cause of action in the bankrupt, "*Duress* "*per minas*," sued upon here as "*moneys had and re-* "*ceived.*"

Look at the case from the opposite side, and it will be seen that for damages for a personal tort, a creditor can make no proof of claim in bankruptcy until he had a judgment, and probably not even then.

Zimmer *vs.* Schleehauf, 115 Mass., 52.
See also on this point House *vs.* Swanson, 7 Tenn., 32.
Howard *vs.* Crowther, 8 M. & W., 601.

The nature of the action for moneys had and received, as looked upon in Pennsylvania, would seem to prohibit absolutely any recovery here by the assignee. So far from its being "against conscience" for the bank to retain this money, it would be the violation of mercantile honor in the bankrupt's creditors to receive and distribute it among themselves. When the law of commerce ceases to be the law of honor, both in theory and practice, then the broad construction given to the provisions of the bankrupt law by the lower court will be affirmed, but not till then. If *ex æquo et bono* the defendant is entitled to retain its own money, the assignee cannot recover in this form of action nor in any other.

"If Reakirt, not having been made a bankrupt, never "could have sued for this money, we are not aware of any "principle upon which a right of sueing for it can be "vested in his assignees."

Nicholson *vs.* Gooch, 5 E. & B., 1015.

Besides, the provisions of the bankrupt act expressly protect both trust property held by the bankrupt and mortgages, liens, privileges, and pledges of his real or personal property. (R. S., 5051, 5052, 5075.) It necessarily follows from these articles that he who is the owner must *a fortiori* be protected, for that right of ownership is far higher and more extensive than any mortgage, pledge, lien, or incumbrance can posssibly be. *Majus continet in se minus.* It would be strange, indeed, if a bankrupt law extended its protection to imperfect ownership, and left the perfect ownership naked and helpless.

The case is still clearer if we suppose that an ordinary judgment-creditor of Reakirt had undertaken to collect his claim, *garnisheeing* the defendant bank. Under no system of jurisprudence could the creditor hold the garnishee responsible for the judgment, on the case stated. And yet the assignee stands in the exact position of a judgment-creditor with execution issued and levied.

This is the mode of reasoning in the Massachusetts cases.

Did the property conveyed in fraud of creditors ever belong to the bankrupt?

In contemplation of law, has the property remained the debtor's property?

As whose property could it be seized on execution?

Audenreid *vs.* Betteley, 5 Allen, 386.

We are not sure that we fully grasp the legal doctrine enunciated at the close of the opinion in the case just quoted; but it appears to us it throws great light upon this case, with this distinction: that in the former the property in possession of the bankrupt was fraudulently represented by the true owner to be the property of the bankrupt; whilst in our case no scintilla of fraud anywhere appears.

The promptitude of the bank and the delays and laches of the assignee are important elements of our case. *Vigilantibus et non dormientibus, &c.* These elements or facts would entitle us to recover on a bill in equity against the banks holding Reakirt's deposits, whether Reakirt were alive or dead, solvent or insolvent.

See the opinions of the Master of Rolls and Lord Justice in Pennell *vs.* Deffell, *ut supra.* 27 L. J. Ch.

As to reasonable time to rescind.

Twin Lick Co. *vs.* Marbury, 91 U. S., 592.

The proceedings against Reakirt being "involuntary," the record shows no adjudication of bankruptcy until the assignment on May 1, 1871. Everything had been finished up at that time. Reakirt retained all his *capacity to act* until then. The *civiliter mortuus* does not begin from the commencement of the proceedings, but from the adjudication of bankruptcy.

In re George W. Dillard, 9 N. B. R. R., 8.

And it seems to us too clear for argument that this suit is in affirmance of the forgery committed on the bank, and cannot be maintained.

Your Honors will bear in mind that all that Jamison

did to induce the restitution of the bank's money was legal and proper. He had an unquestionable legal right to use threats of doing that which the law expressly authorized in such cases, in order to induce the payment and restitution.

Harvey *vs.* Morgan, 2 Starkey, 17.

Ex parte De Tastet in the matter of Latham, in which Brougham overrules C. J. Mansfield and Eldon, in Montague's Bank'y R., 204, and showing the distinction between talking of compounding a felony and actually doing it.

"If courts of justice mean to prevent the perpetration "of crimes, it must be not by allowing a man who has got "possession to remain in possession, but by putting the "parties back to the state in which they were before."

Neville *vs.* Wilkinson, 1 Bro. Ch. R., 547.

It is now no longer a judicial matter of reproach that we have no bankrupt law. This reproach endured, with but two brief interruptions, since the formation of the Government up to the enactment of the present bankrupt act, now modified and set forth in the Revised Statutes. No part of your Honors' jurisdiction is more important, for it really involves the regulation of commerce. The necessity of such a law is manifest. Although the popular branch of the National Legislature has recently twice proposed to repeal the act, yet under the wise administration of the judiciary it is daily becoming more firmly seated in popular favor, in spite of some injudicious and unscientific amendments. But since the enactment of the present law we cannot recall a case in which the true principles of all bankrupt laws may be better or more appropriately un-

folded than in this, now before your Honors, in which it is necessary, in our opinion, to overrule the opinions of the two most learned judges of the lower court. The whole business community is now permeated with forgery; and the direct effect of the judgment of the lower court in this case seems to us to encourage and reward this crime by making the criminal's creditors participators in his guilt and beneficiaries in his criminal operations. That such is the law is simply incredible; and the difficulty has been not so much in the number as in the choice of the arguments needful to make the case clear and beyond all doubt.

We pray your Honors to reverse the judgment and order a *ven. fac. de novo*, with general relief.

DURANT & HORNOR,
Attorneys for the Bank.

WASHINGTON, D. C., *Oct.* 9, 1877.

In the Supreme Court of the United States.

The West Philadelphia Bank, Plaintiff in Error,

vs.

Samuel Dickson and Spencer M. Janney, Assignees of Tryon Reakirt, Defendants in Error.

Otober Term, 1877.

No. 66.

COUNTER-STATEMENT OF DEFENDANTS IN ERROR.

On the 6th February, 1871, the agent of the plaintiff in error was told by Tryon Reakirt that he had committed forgeries to the amount of over $100,000, and that he could only repay $5000 on account of a loan of $10,000 obtained in the previous December. This amount the agent took on that day, and two days afterwards he began suit in New York, and in the usual course of procedure in that State against a non-resident defendant, recovered judgment and collected a further sum by execution on the twenty-sixth of the following April.

The petition in bankruptcy was filed February 13th, 1871, but the assignees were not appointed till May 1st, 1871,—five days after the money had been collected by execution. It appears by the record that Reakirt had

enjoyed good credit up to the time his forgeries were discovered, and that he had such dealings with brokers in New York and Philadelphia as to keep deposit accounts upon which he could check in both cities, and that his forgeries alone had brought him in over $100,000. The agent of the bank, therefore, had not merely had reason to believe, but did actually know, that Reakirt was insolvent, as he was told by him that the $5000 was all he could give at the time, and forgery or fraud is in itself a confession of insolvency.

It was not suggested on the trial, in any point submitted to the court, or in the course of the argument, that the money paid by the two checks or recovered under the execution was the same money that was received from the bank six weeks previously. On the contrary, the eighth point presented is entirely inconsistent with any such contention, as it distinguishes between the money obtained from the bank and the money recovered, which was the subject-matter of suit. The only evidence of title to this money was its possession, which was not even that of Reakirt but of his bankers,—his right being merely the right of the ordinary depositor, which is only that of a creditor, so that there was not even the *scintilla* of evidence which might formerly have gone to the jury ; and, on the other side, though the point not being raised, the evidence was not specially directed to it, enough was unintentionally proven to render it incredible that these credits with three different brokers were based upon deposits of the money obtained from this bank six weeks before.

ARGUMENT.

I. By the fourteenth section of the act of 1867 (Revised Statutes, section 5044) it was enacted—

"As soon as the assignee is appointed and qualified, the

judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment *shall relate back to the commencement of the proceedings in bankruptcy*, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, *although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.*"

The term mesne process is all process issued in suit before execution.

Pennington *vs.* Lowenstein, 1 Bank. Reg., 570.

Comer *vs.* Mallery, 31 Md., 478.

Morgan *vs.* Campbell, 22 Wall., 381.

When the attachment was issued within four months before the commencement of the proceedings in bankruptcy, it will on motion be dissolved by the State court, although a judgment has been entered and the proceeds of a sale of the property under an execution paid over to the plaintiff by the sheriff.

Dickerson *vs.* Spaulding, 15 Bank. Reg., 313.

S. C., 14 N. Y., Sup., 288.

No intervention by the assignee is necessary to create the dissolution. This is done by the bankruptcy.

James *vs.* Beach, 1 Mich., N. P., 94.

If judgment is entered and the property sold after the commencement of the proceedings in bankruptcy, the assignee may recover the proceeds from the attaching creditor.

Bradley *vs.* Frost, 3 Dillon, 457.

In the case of Stuart, assignee, *vs.* Hines *et al.*, 11 Am. L. Reg., N. S., 86, it was decided by the Supreme Court

of Iowa that no valid lien upon property of a bankrupt can be acquired by proceedings in a State court after the filing of a petition in bankruptcy.

Nor is an assignee in bankruptcy bound to go into a State court to defend a suit commenced against the bankrupt after the filing of the petition, and such an action is as to him a nullity.

In the course of his opinion, Day, C. J., said, "In the case at bar, the petition for an adjudication in bankruptcy was filed on the thirty-first day of December, 1868, the filing of this petition constituted the commencement of the bankruptcy proceedings.

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"Where an adjudication of bankruptcy is made following the filing of a petition, then it is judicially established that the proceedings in the case commenced when the petition was filed. *In re* Patterson, 1 Bankrupt Reg., *supra*, 27."

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"The conveyance to the assignee was made on the twenty-eighth day of October, 1869, and related back to the 31st December, 1868, and vested in the assignee all the property of the bankrupt owned by him at that date. The attachments under which the defendants claim were all levied after the petition in bankruptcy was filed. The authorities cited clearly settle the doctrine that after the filing of a petition in bankruptcy no valid lien upon the property at that time owned by the bankrupt can be acquired by proceedings in a State court, and are conclusive in favor of the assignee against the defendants. And, if this were not so, the requirements of the bankrupt act might easily be ignored and its provisions nullified. It can have force and efficiency and can accomplish its purpose by no other construction."

II. The approved form of action in such cases, if there be no special reason for bringing trover, is that of *assumpsit*

for money had and received, and as all the money had been collected before the assignees were appointed it was too late to apply to dissolve the attachment. The only remedy therefore was to treat the money as received to their use.

In speaking of the count for money had and received Chitty says (Pleading, vol 1, 351*):—"And the assignees of a bankrupt may maintain an action for money had and received against a party who took the goods of the bankrupt in execution after an act of bankruptcy and then purchased the goods from the sheriff under a bill of sale, although no money actually passed. * * * This count is sustainable in some cases where money has been received tortiously, or even by the intervention of forgery without any color of contract, or under pretense of a contract not performed by the defendant, although, in general, a party is not at liberty to declare in an action form *ex contractu*, where there has been no contract express or implied. The assignees of a bankrupt may declare for money had and received against a creditor who has levied his debt by *fieri facias* after the act of bankruptcy, or they may declare in *assumpsit* for money received from the bankrupt by way of fraudulent preference anterior to the act of bankruptcy."

See also page 100*.

This has been approved in many cases. Thus, if a person after notice of an act of bankruptcy set up a claim of lien upon certain debts, if such person have really no just claim, action will lie for money had and received to bankrupt's use.

Noble *vs.* Keney, 4 C. and P., 90 (19 E. C. L. R. 421).

So, when assignees might have maintained trover they may waive the tort and bring action for money had and received.

2 Scott, 520, 30 E. C. L. R., 649.

So, assignees under second commission may recover

money received by person with notice of act of bankruptcy, even when the assignees under first commission assented.

Ibid.

So, it will lie against sheriff for proceeds of goods sold after bankruptcy.

Crosfield *vs.* Stanley, 24 E. C. L. R., 47 (4 B and Ad., 87).

So, also, for money paid to sheriff on *ca. sa.* after notice to plaintiff and paid over to him.

Follett *vs.* Hopper, 57 E. C. L. R., 225; 5 C. B., 226.

So, when creditor after act of bankruptcy levies and takes chattels from sheriff under bill of sale.

Reed *vs.* James, 2 E. C. L. R., 58; 1 Stark, 134.

III. But the argument on the other side is mainly directed to establishing the proposition that this was a mere reclamation by the bank of its own.

To this it need only be answered—

First.—The money was treated as Reakirt's own at the time. It was in his possession or to his credit, and it was drawn out on his checks and attached as his property. Such possession was *prima facie* evidence of title, and all parties dealt on this basis.

In Voight *vs.* Lewis, Philadelphia Leg. Int., Nov. 10th, 1876 (McKennan, Circuit J.), as in the cases upon which that decision went, the claimants recognized that the money was *prima facie* the property of the possessor, and proceeded to ear-mark it or establish its identity.

The opinion in Bank *vs.* King, 7 P. F. Sm. (57 Pa. Stat.), 203, is a most instructive exposition of the doctrine, as it explains and limits the leading case of Jackson *vs.* Bank of United States, 10 Barr, 61.

Second.—There was no evidence to go to the jury tending to prove that the money collected was the same as that

originally paid out by the bank; but, on the contrary, it appeared that he was a druggist, manufacturer, and stock speculator in large operations, and a forger to the amount of over $100,000. (Record, page 9.) As against the other creditors who advanced their money, and who are represented by the assignees, the court will not presume that the money in question was the proceeds of a loan made six weeks before rather than of loans secured by like crimes from other creditors who are equally meritorious.

Third.—The point was not made in the court below, and it is not error to omit to charge upon an aspect of the evidence not specifically brought to the attention of the judge.

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